

**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF UTAH**

COMPLAINANT:

UTAH INSURANCE DEPARTMENT

RESPONDENT:

GUARDIAN TITLE INSURANCE
AGENCY OF SOUTHERN UTAH
Attn.: Douglas W. Curtis
1086 South Main Plaza, Suite 101
St. George, UT 84770
License No. 7058

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2009-124-PC
(E-Case No. 2405)

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER, concerning *settlement-escrow* issues, came on to be heard before the Commissioner of the Utah State Insurance Department (“*Department*”) on Thursday, January 12, 2010 at 9:00 o’clock A. M. Mountain Time, with Mark E. Kleinfield, *Administrative Law Judge*, serving as designated *Presiding Officer*.

Said hearing being held at the Department’s offices located at the Utah State Office Building, Room B112, Salt Lake City, Utah 84114, having been convened at the designated time of 9:00 (9:11) A. M., January 12, 2010 and adjourned at 10:07 A. M. on said same day.

Appearances:

M. Gale Lemmon, Utah Assistant Attorney General, Attorney for Complainant, Utah State Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

L. Benson Mabey, Mabey & Coombs, L. C., Attorney for Respondent, 3098 South Highland Drive, Suite 323, Salt Lake City, Utah 84106-6001.

By the Presiding Officer:

Pursuant to a December 2, 2009 *Pre-Hearing Conference Order* a hearing was conducted on January 12, 2010 in the above-entitled proceeding. The Respondents were present at that time.

The hearing was convened and conducted as a **formal hearing** in accordance with Utah Code Ann. Sections 63G-4-204, 63G-4-205, 63G-4-206, 63G-4-207 and 63G-4-208 and Administrative Rule R590-160-6.

ISSUE, BURDEN and "STANDARD OF PROOF"

1. The basic issue(s) in this case is (are):

a. Did the Respondent Guardian Title Insurance Agency of Southern Utah by handling the buyer's side of a sale in a "split" closing on September 30, 2008 and **not** issuing a title policy as part of the transaction violate Section 31A-23a-406(1)(c), Utah Code Ann., 1953, as amended?; and

b. And if so what is the appropriate penalty, if any?

(SEE also Paragraph 2 under DISCUSSION-ANALYSIS.)

2. The "*burden of proof*" or "*burden of going forward*" in this case as to the above issue(s) is on the Complainant Department.

3. As per Utah Administrative Code Rule, R590-160-5(10) as to the above and foregoing "issue(s)" or "question(s)" to be answered the "*standard of proof*" as to issues of fact is to be proven by a "*preponderance of the evidence*".

Both parties presented opening statements.

Thereafter, evidence was offered and received.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Complainant Department:

No formal witnesses

For the Respondent:

No formal witnesses.

The parties based on the stipulated facts were permitted to “pro-offer” their respective clients’ positions and the hearing was conducted in the nature of oral argument.

Exhibits:

Stipulated Exhibits:

1. **Stipulated Exhibit No. 1**, being a copy [2 pages] of Guardian Title Insurance Agency of Southern Utah settlement statement dated September 30, 2008 (escrow file no 08-1552W) for the sale transaction at issue as per the parties January 7, 2010 Stipulation of Facts.

2. **Stipulated Exhibit No. 2**, being a copy [1 page] of Southern Utah Title Company settlement statement dated September 30, 2008 (escrow file no. 151133) for the sale transaction at issue as per the parties January 7, 2010 Stipulation of Facts.

Both of which were accepted and entered of record.

The Complainant Department offered the following exhibits:

The Department in its tendered list of Exhibits under date of January 5, 2010 referenced what are Stipulated Exhibit No. 1 and 2.

The Respondents offered the following exhibits:

The Respondent in its tendered list of Exhibits under date of January 7, 2010 referenced what are Stipulated Exhibit No. 1 and 2 being numbered collectively as “1” and including both settlement statements.

Additionally numbered 2, 3 and 4 the Respondent in its tendered list of Exhibits under date of January 7, 2010 referenced 3 separate additional exhibits¹:

3. **Respondent's Exhibit No. 3**, consisting of two (2) pages of typed and or printed materials, being a copy of letter dated November 3, 2003 from Andrew Arnott, Title Marketing Examiner, Utah Insurance Department, to Corrie Glover, Guardian Title Insurance Agency, referring to possible violations of Section 31A-23a-406 amongst other circumstances and requesting response by May 5, 2003.

4. **Respondent's Exhibit No. 4**, consisting of six (6) pages of typed and or printed materials, being a copy of a letter from L. Benson Mabey, Attorney At Law, legal counsel for Guardian Title Insurance Agency of Southern Utah, dated November 21, 2003 to Andrew Arnott, Title Marketing Examiner, Utah Insurance Department, being an "Explanation of Alleged Violations of UCA 31A-23a-406 (2003).

5. **Respondent's Exhibit No. 5**, consisting of one (1) page of typed and or printed materials, being an email from Gerri Jones, Market Conduct Examiner, dated "3/25/2004" referencing interpretation of 31A-23-406.

All 3 of which were accepted and entered of record.

Argument followed.

The Presiding Officer being fully advised in the premises and taking administrative notice of the files and records of the Department, now enters his *Findings of Fact, Conclusions of Law, and Order*, on behalf of the Department:

FINDINGS OF FACT

I, find by a preponderance of the evidence, the following facts:

Preliminary-Procedural Facts (Paragraphs 1-6)

1. The Utah Insurance Department ("*Department*") is a governmental entity of the State of Utah. The Department as per Utah Code Ann. Section 31A-2-101 is empowered to administer the *Insurance Code*, Title 31A, Utah Code Ann., 1953, as amended.

2. The Respondent, Guardian Title Insurance Agency of Southern Utah ("*Guardian*"), is:

a. an apparent Utah business entity, domiciled in and maintaining a present principal business address of 1086 South Main Plaza, Suite 101, St. George, Utah 84770; and

¹ For continuity purposes these shall be referred to as (Respondent's) Exhibit No. 3, 4 and 5 respectfully.

b. a licensed title insurance agency in the State of Utah having obtained and maintained License No. 7058 since on or about May 16, 2002; and

3. The Department on or about September 22, 2009 filed its “*Complaint*” alleging those particulars as set forth in Paragraph 1 of “*Issue, Burden and “Standard of Proof”*”, above, and issued a “*Notice of Formal Adjudicative Proceeding and Pre-Hearing Conference*”, being Docket No. 2009-124-PC, to the Respondent. A copy of said Notice being mailed to the Respondent at its referenced business address on or about September 22, 2009.

4. The Respondent filed its “*Response*” or answer o October 26, 2009

5. A Pre-Hearing Conference was held on December 2, 2009 and a *Pre-Hearing Conference Order* issued on December 2, 2009 setting said matter for hearing on January 12, 2010 at 9:00 o’clock A. M..

6. That based on the preliminary facts as set forth in paragraphs 1 through 5, immediately above, a hearing was held on January 12, 2010 at 9:00 o’clock A. M..

Operative Facts
(Paragraph 7)

7. The parties tendered their “*Stipulation of Facts*”, numbers 1 through 8, dated January 5, 2010, which read as follows:

“1. Respondent, Guardian Title Insurance Agency of Southern Utah (“Guardian”), is a licensed title insurance agency in the State of Utah, holding License No. 7058.

2. The Utah Insurance Commissioner has jurisdiction in this matter.

3. On September 30, 2008, Respondent, Guardian, conducted an escrow in a split closing in a cash sale of real property where Brent and Laura Baxter acted as sellers and Brigitte Luckau acted a buyer.

4. The sale of the real property was pursuant to a form Real Estate Purchase Contract entered into and signed by Baxters, as sellers, and Luckau, as buyer.

5. Guardian handled the buyer’s side of the sale (escrow file no 08-1552W), accepting a cash payment for the purchase of the property and placing the funds for the purchase into Guardian’s escrow trust account. Guardian prepared a Settlement Statement dated September 30, 2008, for the sale transaction (a copy [2 pages] will be submitted as a stipulated exhibit).

6. Sothern Utah Title Company handled the seller’s side of the sale (escrow file no. 151133). Southern Utah Title prepared a Settlement Statement dated September 30, 2008, for the sale transaction (a copy [1 page] will be submitted as a stipulated exhibit).

7. Guardian did not issue either an owner's or lender's title policy as part of the escrow transaction conducted by Guardian in this matter.

8. Southern Utah Title Company issued an owner's title policy as part of the escrow transaction conducted by Guardian in this matter."²

DISCUSSION-ANALYSIS

(Paragraphs 1 -8)

1. a. Both the Respondent and the Department in large measure while advocating clearly different characterizations or interpretations of the above referenced facts by their stipulation concurred as to the basic *chronology* and **core** facts.

b. The record now being complete sets forth competent and credible evidence for the entry of the following analysis.

2. The question(s) presented is:

a. i. "Whether the Respondent's actions are violative of Utah Code Ann. Section 31A-23a-406(1)(c)(?); and

ii. "If the Respondent has so violated said cited statutory section what, if any, is the appropriate penalty or penalties to be imposed"; and

b. Whether as per Utah Administrative Code Rule, R590-160-5.J as to each of the above and foregoing "issue(s)" or "question(s)" to be answered the "*standard of proof*" as to issues of fact have been proven by a "*preponderance of the evidence*"?

3. Applicable Pertinent Statutes, Administrative Rules and Department Bulletins are as follows (although others may be otherwise specifically cited within the body of this "*Order on Hearing*");

a. Subsection 31A-23a-406(1)(c) states³:

"31A-23a-406. Title insurance producer's business.

(1) A title insurance producer may do escrow involving real property **transaction** if all of the following exist:

(a) ****

² Southern Utah Title Company's actions in the instant September 30, 2008 transaction are not at issue in the present adjudicative proceeding.

³ Respondent Guardian was during all material times relevant hereto a licensed title insurance producer with a an escrow subline of authority and appointed by a title insurer authorized to do business in the state and as such subsections 31A-23a-406(1)(a) and (b) are not at issue.

(b) ****

(c) one or more of the following is to be issued as part of the **transaction**:

(i) an owner's policy of title insurance; or

(ii) a lender's policy of title insurance;

(d) ****

(e) ****

(f) ****

(2) ****

(7) **** .”

(last amended Laws of Utah 2007, Chapter 325, section 10, eff. April 30, 2007)

(EMPHASIS ADDED).

b. Insurance Department Bulletin 2007-5 (dated June 14th, 2007)⁴ states in part:

“In order to conduct an escrow, a title producer must be properly licensed, be appointed by an authorized title insurer, and issue one or more title insurance policies.

A split escrow occurs when two of the parties to a real property transaction conduct their portion of the escrow using two separate title producers. The use of two separate title producers creates two separate transactions and each separate transaction must comply with all of the requirements to conduct an escrow.

A split escrow consists of two separate transactions with each transaction being done by a properly licensed title producer appointed by an authorized title insurer that issues either an owner's or a lender's title insurance policy.

A prohibited split escrow occurs if either of the two separate transactions does not comply with all three of the requirements to conduct an escrow.

A cash only split escrow is prohibited because one of the separate transactions does not include the issuance of a title policy.”

4. a. The Respondent's action or rather in-action in not issuing an owner's or lender's policy as part of the September 30, 2008 transaction *on first blush* on its face would

⁴ It must be noted that there is no Administrative Rule speaking to the “split closing” scenario although there was at one juncture in November 2002 a proposed rule which “lapsed” and never made effective. SEE pages 8 and 9 of Respondent's Pre-Hearing Brief, January 7, 2010.

appear by Respondent's admission to be in violation of the cited statutory (Section 31A-23a-406(1)(c) when read in conjunction with Insurance Department Bulletin 2007-5 (dated June 14th, 2007) as advocate by the Complainant-Department.

b. The Respondents' position(s) rather than one of denial of its (in)actions is one of "demurrer" based on "good faith" or in so many words "*we have complied with the statutory section*" in that an owner's policy was issued during the course of the instant September 30, 2008 "transaction", just not by us but by Southern Utah Title Company.

5. The "**heart**" issue clearly focuses on "what does the word transaction mean"?⁵

6. a. Does transaction mean a singular transaction as one could as does the Respondent argue and an apparent plain reading of Section 31A-23a-406(1)(c) and the issuance of one or the other of an owner's or lender's policy, but of statutory necessity only one or the other, would seem to imply;

or

b. Does transaction encompass when applying the "split" closing definition of Bulletin 2007-5 two separate transactions within the overall real estate sale, each "part" necessitating an owner's or lender's policy being issued on each side of the escrow closing?

6. Both parties presented admirable pre-hearing briefs and the Presiding Officer is appreciative of the efforts of both counsel and their able and in compliance with the state bar's advocacy of their client's respective positions with civility and professionalism.

7. Statutory construction favors a "plain reading" of a statute in the absence of specific language to the contrary. The legislature in passing Section 31A-23a-406(1)(c) could have set forth the interpretation the Department urges in the present instance that "transaction" is (can be) a multiple of transactions and not a singular sale transaction. The legislature apparently either consciously chose not to or by default inferred a "plain reading" approach. Additionally the Department could have passed an administrative rule extrapolating and defining a plural "transaction" approach within the context of Section 31a-23A-406(1)(c).

⁵ Counsel for the Department in his pre-hearing brief makes an extended analysis that "transaction" as applied to a real estate or property transaction differs from an escrow transaction. The Presiding Officer would not materially disagree. It is though to the statute (Section 31A-23a-406(1)(c) we must ultimately look for guidance. The introductory part of the section, subsection (1) speaks of authority to conduct an escrow as to a class "**involving real property transactions**". Grammatically the thereafter references to "transaction" would refer back to a "real estate transaction" over which an escrow was being conducted, not an "escrow transaction" itself. Additionally while an escrow can and is customarily defined as a transaction it is in the context of the instant statutory subsection a fee for service "service" which may arguably encompass multiple parts. The transaction though spoken of in the instant subsection is a "real property transaction" not an "escrow transaction".

While an administrative rule was proposed by the Department in November 2002 such “lapsed” and never become law.

What we are left with is, a while not ambiguous, a bulletin dated June 14, 2007 which in its reading goes against a plain reading and stretches credulity in logic. The bulletin clearly states the Department’s present position that a singular “transaction” or sale, especially in a “cash split closing”, is more than singular and is in “fact” “two separate transactions or plural. In essence “transaction” does not mean singular it means two or multiple or whatever the Department desires it to be.⁶

The “weight” of a bulletin, especially in the absence of the ongoing opportunity to enact an administrative rule, is in the Presiding Officer’s mind questionable at best.

Absent an administrative rule reading such bulletin in comparison to a “plain reading” of the statute itself further diminishes the bulletin’s “persuasiveness”.

8. Curiously the present Department position is the latest “swing” in the “pendulum” approach of the Department. Transaction meant plural. Then it meant singular. Now it means plural again. SEE in particular Respondent’s Exhibit No. 5.

BASED ON THE ABOVE AND FOREGOING FINDINGS OF FACT and discussion-analysis the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. a. The term “transaction” within the plain reading and meaning of Section 31A-23a-406(1)(c) means one (1) all encompassing sale of a piece(s) of real estate whether such is accomplished in a “non-“split closing”” or a “split closing” whether a “cash” “split closing” or otherwise.

b. The issuance of at a minimum of either an owner’s policy or a lender’s policy whether in a “non-“split closing”” or a “split closing” satisfies the requirements of Section 31A-23a-406(c).

2. The Respondent Guardian Title Insurance Agency of Southern Utah did **not** violate Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant’s September 22, 2009 Complaint.

⁶ Additionally the bulletin absolutely “prohibits” cash split closing-escrows although how such “prohibition” is to be enforced is not spelled out. Nor what authorizes such prohibited act appears absent from statute or rule. From a search of Utah statutes and rules the phrase itself “split closing appears undefined or even referenced absent Bulletin 2007-5.

3. The Respondent Guardian Title Insurance Agency of Southern Utah **not** having violated Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant's September 22, 2009 Complaint such charge should be dismissed.

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW the Presiding Officer enters the following:

ORDER

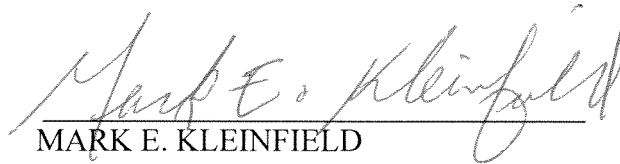
WHEREFORE, IT IS ORDERED, that:

1. The Respondent Guardian Title Insurance Agency of Southern Utah **not** having violated Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant-Department's September 22, 2009 Complaint such charge is dismissed.

DATED and ENTERED this 28 day of March, 2010.

**NEAL T. GOOCH,
ACTING INSURANCE COMMISSIONER**





MARK E. KLEINFELD
ADMINISTRATIVE LAW JUDGE and
PRESIDING OFFICER
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ADMINISTRATIVE AGENCY REVIEW

Administrative Agency Review of this Order may be obtained by filing a Petition for Review with the Commissioner of the Utah Insurance Department within thirty (30) days of the date of entry of said Order consistent with Utah Code Ann. Section 63G-4-301 and Administrative Rule R590-160-8.

Failure to seek agency review shall be considered a failure to exhaust administrative remedies.

(R590-160-8 and Section 63G-4-401)

JUDICIAL REVIEW

As an **“Formal Hearing”** after agency review judicial review of this Order may be obtained by filing a petition for such review consistent with Utah Code Ann. Section 63G-4-403.

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of March, 2010 a true and correct copy of the above and foregoing **ORDER ON HEARING (Formal Hearing)** was sent certified mail, return receipt requested, and first class mail, both postage prepaid to the following:

L. Benson Mabey
Attorney At Law
Mabey & Coombs, L. C.
3098 South Highland Drive, Suite 323
Salt Lake City, Utah 84106-6001

and a true and correct copy hand-delivered to the following:

M. Gale Lemmon
Utah Assistant Attorney General
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114

