

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

COMPLAINANT:

UTAH INSURANCE DEPARTMENT

RESPONDENT:

WENDY LEE EVERTSEN
8361 South 1100 East
Sandy, Utah 84094

License No. 71745

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2007-046-PC
Enf. Case No. 1845

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER concerning whether Respondent's title insurance agent's license should be revoked came onto be heard before the Commissioner of the Utah State Insurance Department ("Department") on Wednesday, September 12, 2007 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 in Room W130, West (House) Building located at the State Capitol Complex, Salt Lake City, Utah 84114, having been convened at the designated time of 9:00 (9:25) A. M., September 12, 2007 and adjourned at 3:57 P. 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.

Royce B. Covington and Ronald G. Russell, Parr Waddoups Brown Gee & Loveless, P. C., Attorneys for Respondent, 185 South State Street, Suite 1300, Salt Lake City, Utah 84111.

By the Presiding Officer:

Pursuant to an August 6, 2007 Scheduling Order a formal hearing was conducted on September 12, 2007 in the above-entitled proceeding. The Respondent was present at that time.

The hearing was convened and conducted as a **formal hearing** in accordance with Utah Code Ann. Sections 63-46b-6, 63-46b-7, 63-46b-8, 63-46b-9 and 63-46b-10 and Administrative Rule R590-160-6.

ISSUE, BURDEN and "STANDARD OF PROOF"

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

a. Should Respondent's title insurance agent's license be revoked?

(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:

1. Doug LeDoux¹, Fraud Investigator, Fraud Division, Utah Insurance Department, 230 South 500 East, Suite 170, Salt Lake City, Utah 84102.

2. Gerri Jones, Market Conduct Examiner, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

¹ Mr. LeDoux also testified as a Department rebuttal witness.

For the Respondent:

1. Frank Medina², Bonneville Superior Title Company, 7050 Union Park Center, Suite 10, Midvale, Utah 84047.
2. Gayle H. Johnson, Bachman Stewart Title, 6995 South Union Park Center, Suite 150, Midvale, Utah 84047.
3. Wendy Lee Evertsen, Respondent, 8361 South 1100 East, Sandy, Utah 84094.
4. Bruce Haney, Founders Title, 746 East Winchester Street, Suite 100, Murray, Utah 84107.

All of whom were sworn and testified.

Exhibits:

The Complainant Department offered the following exhibits:

1. **Complainant's Exhibit No. 1**, consisting of eight (8) type written or printed pages, being a copy of a June 14, 2002 "Real Estate Purchase Contract" by and between Brian L. McCrea, Buyer, and Sharla Birschbach, Seller, concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.
2. **Complainant's Exhibit No. 2**, consisting of six (6) type written or printed pages, being a copy of a June 17, 2002 "Uniform Residential Loan Application" by Brian L. McCrea and Co-Applicant Kevin Rowe, regarding property located at 8380 South 2200 West, West Jordan, Utah 84088.
3. **Complainant's Exhibit No. 3**, consisting of four (4) type written or printed pages, being a copy of an August 1, 2002 "General Closing Instructions" concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.
4. **Complainant's Exhibit No. 4**, consisting of two (2) type written or printed pages, being a copy of an August 1, 2002 "Settlement Statement" concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.
5. **Complainant's Exhibit No. 5**, consisting of one (1) type written or printed page, being a copy of an August 1, 2002 "Seller's/Borrower's Affidavit as to Debts and Liens" of Jeff Birschbach and Sharla Birschbach concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.
6. **Complainant's Exhibit No. 6**, consisting of one (1) type written or printed page, being a copy of an August 1, 2002 "Official Check" drawn on Zions Bank in the amount of \$54,000.00 payable to Equity Title with a handwritten reference on check of "file

² Respondent witnesses Medina and Johnson due to prior schedule commitments were by oral Stipulation of the parties permitted to testify out of order immediately after Department witness LeDoux.

#2123405”, and an accompanying deposit slip for deposit in Equity Title Ins. Agency Inc. Trust Account.

7. **Complainant’s Exhibit No. 7**, consisting of two (2) type written or printed pages, being a copy of an August 1, 2002 “Warranty Deed” from Jeff Birschbach and Sharla Birschbach, Grantors, to Brian L. McCrea, Grantee, referencing property “See Attached Exhibit “A” 21-33-435-007”.

8. **Complainant’s Exhibit No. 8**, consisting of twenty (20) type written or printed pages, being a copy of an August 1, 2002 “Deed of Trust” between Brian L. McCrea, Borrower, and BNC Mortgage, Inc., a Delaware corporation, Lender, and First American Title of Utah, Trustee, concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

9. **Complainant’s Exhibit No. 9**, consisting of three (3) type written or printed pages, being a copy of an August 1, 2002 “Promissory Note” in the amount of \$56,000.00 from Brian L. McCrea and Kevin T. Rowe, (Makers) payable to BLANK with the following noted therein “This note is secured by a Trust Deed of even date herewith(.)” amongst other terms.

10. **Complainant’s Exhibit No. 10**, consisting of one (1) type written or printed page, being a copy of an August 2, 2002 “Outstanding Underwriting Conditions” concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

11. **Complainant’s Exhibit No. 11**, consisting of one (1) type written or printed page, being a copy of an August 8, 2002 “Conditional Loan Approval” to Brian L. McCrea concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

12. **Complainant’s Exhibit No. 12**, consisting of one (1) type written or printed page, being a copy of an August 8, 2002 “Funding Audit Sheet” concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

13. **Complainant’s Exhibit No. 13**, consisting of eleven (11) type written or printed pages, being a copy of an August 21, 2002 cover sheet and an August 8, 2002 “Lender’s Policy” referencing Mortgage Electronic registration Systems, Inc., Insured, showing Brian L. McCrea, vested party, concerning a metes and bound description property (appears to be same description as shown in Respondent’s Exhibit No.s 11 and 12, below).

14. **Complainant’s Exhibit No. 14**, consisting of five (5) type written or printed pages, being a copy of an August 27, 2007 “Minute Sheet” printout apparently from the Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 061401532 entitled State of Utah vs. Wendy Lee Evertsen.

15. **Complainant’s Exhibit No. 15**, consisting of ten (10) type written or printed pages, being a copy of a January 29, 2007 “Statement of Defendant in Support of Guilty Plea in

Abeyance and Certificates of Counsel” and accompanying January 29, 2007 “Order” in Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 061401532 entitled State of Utah vs. Wendy Lee Evertsen.

16. Complainant’s Exhibit No. 16, consisting of six (6) type written or printed pages, being a copy of a January 3, 2002 “Stipulation & Order” Before the Insurance Commissioner of the State of Utah in a certain case entitled Complainant Utah Insurance Department, Respondent Wendy L. DeMita Evertsen.

17. Complainant’s Exhibit No. 17, consisting of five (5) type written or printed pages, being a copy of a November 10, 2005 “Trustee’s Deed” from James H. Woodall, Successor Trustee, to Brian L. McCrea, Trustor, concerning a certain metes and bounds real estate parcel; and a December 20, 2005 “Trustee’s Deed” from Title & Escrow Insurance Agency, Inc., to Jeff Birschbach and Sharla Birschbach, husband and wife, concerning a certain metes and bounds real estate parcel.

18. Complainant’s Exhibit No. 18, consisting of eight (8) type written or printed pages, being a copy of a January 16, 2006 “Complaint” and an March 20, 2006 “Affidavit of Jeff Birschbach” apparently filed in the Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 060900901 entitled Jeff Birschbach and Sharla Birschbach, Plaintiffs, v. BNC Mortgage, Inc., et al, Respondent(s).

19. Complainant’s Exhibit No. 19, consisting of eighteen (18) type written or printed pages, being a copy of a June 5, 2006 “Amended Answer” apparently filed in the Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 060900901 entitled Jeff Birschbach and Sharla Birschbach, Plaintiffs, v. BNC Mortgage, Inc., et al, Respondent(s).

(No objection being made or by stipulation which all exhibits were accepted and entered.)

The Respondent offered the following exhibits:

1. Respondent’s Exhibit No. 1, consisting of one (1) page of typed and or printed materials, being a copy of a June 19, 2002 Equity Title Insurance Agency, Inc. “order sheet”, being Order No. 2123405, ordered by American Union Mortgage, concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

2. Respondent’s Exhibit No. 2, consisting of eight (8) pages of typed and or printed materials, being a copy of a June 14, 2002 “Real Estate Purchase Contract” by and between Brian L. McCrea, Buyer, and Sharla Birschbach, Seller, concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

3. Respondent’s Exhibit No. 3, consisting of four (4) pages of typed and or printed materials, being a copy of an August 1, 2002 “General Closing Instructions” concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

4. **Respondent's Exhibit No. 4**, consisting of two (2) pages of typed and or printed materials, being a copy of an August 1, 2002 "Settlement Statement" concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

5. **Respondent's Exhibit No. 5**, consisting of one (1) page of typed and or printed materials, being a copy of an August 1, 2002 "Official Check" drawn on Zions Bank in the amount of \$54,000.00 payable to Equity Title with a handwritten reference on check of "file #2123405", and an accompanying deposit slip for deposit in Equity Title Ins. Agency Inc. Trust Account.

6. **Respondent's Exhibit No. 6**, consisting of two (2) pages of typed and or printed materials, being a copy of an August 8, 2002 "Disbursement Register" regarding Order No. 2123405 concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

7. **Respondent's Exhibit No. 7**, consisting of one (1) page of typed and or printed materials, being a copy of an August 8, 2002 "Check" drawn on KeyBank from the trust account of Equity Title Insurance Agency Inc. in the amount of \$88,365.82 payable to Jeff and Sharla Birschbach, and an attached disbursement description.

8. **Respondent's Exhibit No. 8**, consisting of one (1) page of typed and or printed materials, being a copy of an August 1, 2002 "Warranty Deed" from Jeff Birschbach and Sharla Birschbach, Grantors, to Brian L. McCrea, Grantee, referencing property "See Attached Exhibit "A" 21-33-435-007". (NOTE: Attachment "A" is not attached).

9. **Respondent's Exhibit No. 9**, consisting of nineteen (19) pages of typed and or printed materials, being a copy of an August 1, 2002 "Deed of Trust" between Brian L. McCrea, Borrower, and BNC Mortgage, Inc., a Delaware corporation, Lender, and First American Title of Utah, Trustee, concerning property located at 8380 South 2200 West, West Jordan, Utah 84088.

10. **Respondent's Exhibit No. 10**, consisting of one (1) pages of typed and or printed materials, being a copy of an August 1, 2002 "Promissory Note" in the amount of \$56,000.00 from Brian L. McCrea and Kevin T. Rowe, (Makers) payable to BLANK with the following noted therein "This note is secured by a Trust Deed of even date herewith(.)" amongst other terms.

11. **Respondent's Exhibit No. 11**, consisting of twelve (12) pages of typed and or printed materials, being a copy of an August 1, 2002 "Trust Deed" between Brian L. McCrea, Trustor, and Equity Title Company, Trustee, and Jeff Birschbach and Sharla Birschbach, Beneficiary, concerning property located Salt Lake County, Utah "see Attached Exhibit "A"" (attached as Exhibit "A" is a metes and bound description). 84088.

12. **Respondent's Exhibit No. 12**, consisting of eleven (11) pages of typed and or printed materials, being a copy of an August 21, 2002 cover sheet and an August 8, 2002 "Lender's Policy" referencing Mortgage Electronic registration Systems, Inc., Insured, showing Brian L. McCrea, vested party, concerning a metes and bound description property (appears to be same description as shown in Respondent's Exhibit No. 11, immediately above).

13. **Respondent's Exhibit No. 13**, consisting of forty-one (41) pages of typed and or printed materials, being a copy of a March 20, 2006 "Affidavit of Jeff Birschbach" apparently filed in the Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 060900901 entitled Jeff Birschbach and Sharla Birschbach, Plaintiffs, v. BNC Mortgage, Inc., et al, Respondent(s). Attached are several Exhibits, including many of the same exhibits as shown as Respondent's Exhibit No.s 1 through 12, above, although not necessarily all, amongst others not shown above). SEE Exhibit.

(No objection being made or by stipulation which all exhibits were accepted and entered.)

Argument followed.³

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- 13)

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, Wendy Lee Evertsen:

a. is a resident of the State of Utah and maintains a present mailing address of 8361 South 1100 East, Sandy, Utah 84904; and

³ Both parties filed post hearing briefs on the issue of "duties of escrow officers in Utah". SEE file.

b. is a licensed title insurance agent holding Utah Insurance Department License No. 71745.

3. The Department filed its Complaint on April 30, 2007 and a “Notice of Formal Adjudicative Proceeding and Pre-Hearing Conference”, being Docket No. 2007-046-PC/Enf.Case No. 1845 was issued on May 2, 2007 setting June 5, 2007 at 10:00 A. M. at the Department’s Offices as the time and place for a pre-hearing. A copy of said Notice being mailed to the Respondent or about May 2, 2007.

4. The Respondent filed her “response” or “answer” with the Department on June 4, 2007.

5. Prior to the scheduled June 5, 2007 pre-hearing the scheduled pre-hearing date was continued without date.

6. An August 7, 2007 Hearing date was set.

7. Respondent engaged legal counsel shortly prior to July 31, 2007.

8. Pursuant to a July 31, 2007 joint telephone conversation between the parties’ legal counsel and the Hearing Officer the August 7, 2007 hearing date was stricken.

9. On August 3, 2007 Counsel for the Respondent filed his appearance.

10. On August 10, 2007 the Respondent’s legal counsel filed his Motion for Continuance.

11. On August 6, 2007 a Scheduling Order⁴ setting the present matter for formal hearing on September 12, 2007 was entered.

12. On August 31, 2007 the Respondent filed her Motion to Exclude Plea in Abeyance from Formal Adjudicative Proceeding.⁵

13. That based on the preliminary facts as set forth in paragraphs 1 through 12, immediately above, through means of an August 6, 2007 “Scheduling Order”, mailed to the Respondent’s legal counsel on August 6, 2007, this present hearing was set for September 12, 2007 beginning at 9:00 A. M..

⁴ The Scheduling Order also referencing August 27, 2007 witness and exhibit list deadlines.

⁵ Respondent’s accompanying Memorandum in support and subsequent Complainant opposition Memorandum being filed. The Hearing Officer immediately prior to the September 12, 2007 hearing denied such motion as well as denying a subsequent oral Motion to Continue by Respondent.

Operative Facts

(Paragraphs 14 -19)

14. The Respondent, Wendy Lee Evertsen, is a licensed title insurance agent in the State of Utah, License No. 71745.

15. On or about August 1, 2002, Respondent, acting as an escrow agent, closed a transaction for a property located at 8380 South 2200 West, West Jordan, Utah, with Brian L McCrea as buyer and Jeff and Sharla Birshback as sellers and BNC Mortgage as lender. Title insurance was issued in connection with this transaction.

16. In connection with the closing, Respondent prepared a "HUD1"⁶ showing that the buyer was bringing in \$54,000.00 to the closing as part of the purchase price and that there was no seller financing in the transaction, whereas she was aware that that was not the case.

17. In connection with the closing, Respondent prepared a note from the buyer to the seller for \$56,000.00 and a trust deed⁷, which evidenced that the seller had financed that portion of the purchase price.

18. Respondent failed to follow the closing instructions⁸ from the lender that instructed that there was to be no secondary financing and that the lender's trust deed was to be in first position.

19. Respondent entered a guilty plea on January 29, 2007, in Third District Court, Salt Lake County, State of Utah to Attempted Conspiracy, a class A misdemeanor, which plea is currently being held in abeyance pending the successful completion of one year probation.

DISCUSSION-ANALYSIS

1. a. Both the Respondent and the Department in large measure while advocating clearly different characterizations or interpretations of the above referenced operative facts in substance 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.

⁶ Respondent's Exhibit No. 4.

⁷ Complainant's Exhibit No. 9.

⁸ Complainant's Exhibit No. 3.

2. The question(s) presented is:

a. “Whether the Respondent’s actions are:

i. violative of Utah Code Ann. Section 31A-23a-402(1)(a)(i) as being a false or misleading statement(s) relating to an insurance product; and or

ii. violative of Utah Code Ann. Section 31A-23a-107(2) as being a breach of the character requirements to hold an insurance agent’s license?”; and

b. “If the Respondent has so violated both or either of said cited statutory sections is revocation of Respondent’s title insurance agent’s license pursuant to Utah Code Ann. Section 31A-23a-111(5)(b)(i) and (b)(ii)(A) the appropriate penalty and if not, what is the appropriate penalty to be imposed?”; and

c. Whether as per Utah Administrative Code Rule, R590-160-5(10) 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 are as follows (although others may be otherwise specifically cited within the body of this “*Order on Hearing*”):

a. Subsection 31A-23a-402(1)(a)(i) and (ii) states:

31A-23a-402. Unfair marketing practices -- Communication -- Inducement -- Unfair discrimination -- Coercion or intimidation -- Restriction on choice.

(1) (a) (i) Any of the following may not make or cause to be made any communication that contains false or misleading information, relating to an insurance product or contract, any insurer, or any licensee under this title, including information that is false or misleading because it is incomplete:

(A) a person who is or should be licensed under this title;

(B) an employee or producer of a person described in Subsection (1)(a)(i)(A);

(C) a person whose primary interest is as a competitor of a person licensed under this title; and

(D) a person on behalf of any of the persons listed in this Subsection (1)(a)(i).

(ii) As used in this Subsection (1), "false or misleading information" includes:

(A) assuring the nonobligatory payment of future dividends or refunds of unused premiums in any specific or approximate amounts, but reporting fully and accurately past experience is not false or misleading information; and

(B) with intent to deceive a person examining it:

(I) filing a report;

(II) making a false entry in a record; or

(III) wilfully refraining from making a proper entry in a record.

(EMPHASIS ADDED.)

b. Subsection 31A-23a-107 states:

31A-23a-107. Character requirements.

Each applicant for a license under this chapter shall show to the commissioner that:

(1) the applicant has the intent in good faith, to engage in the type of business that the license applied for would permit;

(2) if a natural person, the applicant is competent and trustworthy; or, if the applicant is an agency, all the partners, directors, or principal officers or persons having comparable powers are trustworthy, and that it will transact business in such a way that all acts that may only be performed by a licensed producer, limited line producer, customer service representative, consultant, managing general agent, or reinsurance intermediary are performed exclusively by natural persons who are licensed under this chapter to transact that type of business and designated on the agency's license;

(3) the applicant intends to comply with Section 31A-23a-502; and

(4) if a natural person, the applicant is at least 18 years of age. (EMPHASIS ADDED.)

c. Subsection 31A-23a-111(5)(b)(i) and (b)(ii)(A) states:

31A-23a-111. Revocation, suspension, surrender, lapsing, limiting, or otherwise terminating a license -- Rulemaking for renewal or reinstatement.

(5) (a) If the commissioner makes a finding under Subsection (5)(b), after an adjudicative proceeding under Title 63, Chapter 46b, Administrative Procedures Act, the commissioner may:

(i) revoke:

(A) a license; or

(B) a line of authority;

(ii) suspend for a specified period of 12 months or less:

(A) a license; or

(B) a line of authority; or

(iii) limit in whole or in part:

(A) a license; or

(B) a line of authority.

(b) The commissioner may take an action described in Subsection (5)(a) if the commissioner finds that the licensee:

(i) is unqualified for a license or line of authority under Sections 31A-23a-104 and 31A-23a-105;

(ii) has violated:

(A) an insurance statute;

4. The Respondent's actions and inactions are in violation of both of the cited statutory sections of UCA 31A-23a-402(1)(a) and 31A-23a-107(2).

5. Respondent's January 29, 2007 "Statement of Defendant in Support of Guilty Plea in Abeyance and Certificates of Counsel" in Third District County in and for Salt Lake County, State of Utah in a certain case being Case No. 061401532 entitled State of Utah vs. Wendy Lee Evertsen reads in part:

“I have received a copy of the information against me. I have read it, or had it read to me, and I understand the nature and the elements of the crime to which I am pleading guilty in abeyance.

The elements of the crime to which I am pleading guilty in abeyance are:

1. That I, WENDY LEE EVERTSEN, a party to the offense;
2. On or about August 1, 2002;
3. Intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of the conduct and any one of them commits an overt act in pursuance of the conspiracy.

I understand that by pleading guilty in abeyance I will be admitting that I committed the crime⁹ listed above. I stipulate and agree that the following facts described my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty plea and prove the elements of the crime to which I am pleading guilty.

I attempted to conspire with other persons to defraud BNC Mortgage by withholding information from BNC with the intent to induce BNC to lend money for the purchase of property.”

(Pages 2-3, Complainant Exhibit No. 15.)

6. It is **abundantly** clear that Respondent’s entry of a guilty plea in a criminal proceeding, whether “straight-up” or in abeyance, as to a fraudulent act bespeaks of her lack of character and lack of trustworthiness. This being as regards any type of business transaction and especially so as to an actual insurance related transaction like the referenced Birschbach-BNC funding matter that took place on August 1, 2002.

7. Based on Section 31A-23a-107(2) alone Respondent’s actions bring into play section 31A-23a-111 and the Commissioner’s power to revoke, suspend or otherwise limit in whole or part the Respondent’s license.

8. As to Section 31A-23a-402 and whether the Respondent violated subsection (1)(a)(i) therein by **“mak[e](ing) or caus[e](ing) to be made any communication that contains false or misleading information, relating to an insurance product or contract, , including information that is false or misleading because it is incomplete(:)”** one arguably can say that the partaking in criminal activity within the same circumstances of the instant August 1, 2002 insurance transaction¹⁰ is a violation *per se*. Especially where the licensee has plead guilty to the underlying or overlaying criminal act.

⁹ Attempted conspiracy UCA Section 76-4-201 (2001), a Class “A” Misdemeanor.

¹⁰ A lender’s policy (Complainant’s Exhibit No. 13/ Respondent’s Exhibit No. 12) of title insurance subsequently being issued.

9. Respondent makes much about that there is or was no duty of a title insurance agent in an escrow transaction to “police the legitimacy of all aspects of an escrow transaction, and report to one of the parties to whom it owes a fiduciary duty certain conduct because the escrow agent may observe conduct that appears suspicious or unusual”. (SEE Page 2, Respondent’s Supplemental Brief Re: Duties of Escrow Officers in Utah, October 1, 2007).

10. Setting aside such issue for the moment it does though seem **abundantly** clear again that a title insurance agent owes a duty to one (all) of the parties to whom it owes a fiduciary duty at a minimum **not** to engage in criminal activity in the course of the escrow transaction in detriment to that party. This is at the heart of Respondent’s (in)action in the instant circumstances.

11. a. While counsel for Respondent references that “the sole allegation of wrongdoing on the part of Ms. Evertsen involved her preparation of a note and trust for a buyer and seller after conducting an escrow transaction involving a loan by an institutional lender to the same buyer”¹¹ such is like “a drop of ink in a glass of milk”. Such not only soured the milk, it poisoned it.

b. Respondent’s actions in her “attempt[ed] to conspire with other persons to defraud BNC Mortgage by withholding information from BNC with the intent to induce BNC to lend money for the purchase of property”¹² is violative of Section 31A-23a-402(1)(a). Respondent’s inaccurate “preparation of a note and trust deed for a buyer and seller after conducting an escrow transaction involving a loan by an institutional lender to the same buyer” equates to making a false entry in a record and or willfully refraining from making a proper entry in a record. (Section 31A-23a-402(1)(a)(ii)(B)(II) and (III).

12. Respondent’s actions based on Section 31A-23a-402(1)(a) bring into play section 31A-23a-111 and the Commissioner’s power to revoke, suspend or otherwise limit in whole or part the Respondent’s license.

13. Returning to Respondent’s position that there is or was no duty of a title insurance agent to “police the legitimacy of all aspects of an escrow transaction, and report to one of the parties to whom it owes a fiduciary duty certain conduct because the escrow agent may observe conduct that appears suspicious or unusual” such while interesting and arguably relevant is not material.

14. As to the “character requirements” statute, Section 31A-23a-107, the standard is generically “trustworthiness”. The lack of trustworthiness does not require the breach of nor the presence of a fiduciary duty. As set forth in Paragraph 6, above. Respondent’s actions and admissions bespeak and broadcast aloud her lack of trustworthiness.

15. a. As to the “communication that contains false or misleading information” statute, Section 31A-23a-107, the “standard” is 1) communication and 2) false or misleading

¹¹ Pages 1-2 of Respondent’s October 1, 2007 Supplemental Brief.

¹² SEE Complainant Exhibit No. 15.

information, and does not necessitate a breach of fiduciary duty let alone require the presence of a fiduciary duty.

b. Section 31A-23a-402 is “primarily” an unfair marketing practices statute. From subsection 31A-23a-402(2) onward the bulk of the statute is a “may not” statute delineating those things a licensee may not do as to specific marketing scenarios.

c. Subsection 31A-23a-402(1) on the other hand bespeaks generically as regards communication and false or misleading information by a licensee.

16. a. It is clear from the record that the Respondent’s inaccurate “preparation of a note and trust deed” was false or misleading. The 2nd (1st) element is the “communication” of the same.

b. i. Respondent’s plea in abeyance statement to the Third District Court clearly shows she intended “to defraud BNC Mortgage by withholding information from BNC”.

ii. Is though withholding information a “communication”?

c. In daily interaction what is not said can be as important and many times more important than what is said.

d. A reasonable assumption is that a lender (BNC) expects that the information provided to it by a buyer, seller and the closing entity to a real estate transaction, either before or after closing, is accurate and complete. This whether a fiduciary duty is present or not.

e. That Respondent failed or neglected, either before or after the instant August 1, 2002 closing, to provide or communicate accurate and complete information to BNC bolstered or “communicated” the assumption (presumption) that the information that was provided and communicated was accurate and complete when in fact it was neither.

f. This is true whether the communication took place prior to the August 1, 2002 closing or more probably after the August 1, 2002 closing when the promissory note had been signed, the trust deed filed and recorded and a lender’s title insurance policy issued.

g. Respondent’s non-verbal withholding of information was “communication” within the intent of Section 31A-23a-402.

17. Based on the above and foregoing analysis it is unnecessary to address what duty, if any, is owed by a title insurance agent acting in an escrow setting to the any of the parties, especially the lender, like the instant August 1, 2002 escrow.¹³

¹³ The ALJ much appreciates the briefs provided by respective counsel and the attendant cases referenced therein.

18. The final question or issue to be addressed is whether or not the appropriate penalty is revocation or something lesser?

19. Respondent's record absent one (1) earlier circumstance¹⁴ prior to the instant factual situation would appear to be relatively clean.

20. a. Such having been said Respondent's actions while more than five (5) years ago are extreme and place herself, the industry and the department in a very bad light. Such giving the Administrative Law Judge as well as I believe the general public great concern.

b. i. The criminal conviction, notwithstanding it being "in abeyance" bespeaks of untrustworthiness. Had such fraud conviction in any manner, such as a bad check or forgery case or similar, been on Respondent's record prior to her initial application it would seem probable her initial license would have been denied.

ii. Additionally, while the record is not clear it appears the present administrative action, as well as the criminal proceeding were brought to light not by the Respondent coming forward herself but by department investigation.

c. Based on the whole record it seems that the most appropriate penalty in protecting the public is revocation

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

CONCLUSIONS OF LAW

1. Respondent in making false or misleading statements relating to an insurance product violated Utah Code Annotated § 31A-23a-402(1)(a)(i).
2. Respondent's actions demonstrate that she does not meet the character requirements to hold an insurance agent's license under Utah Code Annotated § 31A-23a-107(2).
3. That the Department's Complaint asking for revocation of the Respondent's title insurance agent's license is sustained by a preponderance of the evidence.
4. Respondent's title insurance agent's license should be revoked pursuant to Utah Code Annotated § 31A-23a-111(5)(b)(i) and (b)(ii)(A).

¹⁴ **SEE** Complainant Exhibit No. 16 being a January 3, 2002 Stipulation & Order. Respondent stipulating to her having closed 31 real estate transactions as a title escrow agent in August 2001 when she was not licensed to act as such at the time. Such being less than one (1) year prior to the instant August 1, 2002 circumstances.

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

ORDER

WHEREFORE, IT IS ORDERED that:

The Respondent's title insurance agent's license pursuant to Utah Code Annotated § 31A-23a-111(5)(b)(i) and (b)(ii)(A) is revoked effective upon entry of the present Order.

DATED and ENTERED this 31 day of March, 2008.

**D. KENT MICHIE,
INSURANCE COMMISSIONER**



A handwritten signature in cursive script, reading "Mark E. Kleinfeld".

MARK E. KLEINFELD
ADMINISTRATIVE LAW JUDGE and
PRESIDING OFFICER
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114
Tel: (801) 537-9246/Fax: (801) 538-3829
Email: MKleinfeld@utah.gov

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 63-46b-12 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 63-46b-14)

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 63-46b-16.

ADMINH.Evertsen.Formal.dec.03-31-08

CERTIFICATE OF MAILING

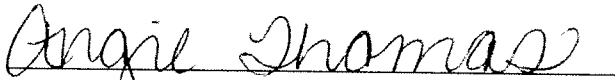
I do hereby certify that on this date I mailed, by regular mail, postage prepaid, a true and correct copy of the attached:

ORDER ON HEARING

To the following:

Wendy Lee Evertsen
8361 South 1100 East
Sandy, Ut 84094

DATED this 3rd day of April, 2008.



Angie Thomas Court Clerk
Utah Department of Insurance
State Office Building, Room 3110
Salt Lake City, UT 84114-6901