

**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 REMAND
(Formal Hearing)

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

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE BASED ON REMAND
FROM THE COMMISSIONER

THIS MATTER, concerning *settlement-escrow* issues, having been remanded back to the Presiding Officer after issuance of an *Order on Petition for Agency Review of Order* under date of December 14, 2010 came on to be heard as to imposition of penalty and forfeiture before Mark E. Kleinfield, *Administrative Law Judge*, serving as designated *Presiding Officer*, based on the record in the file without the necessity of further hearing or argument of the parties.

ISSUE ON REMAND

The basic issue in this case at this juncture is: 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 and thus having violated Section 31A-23a-406(1)(c), Utah Code Ann., 1953, as amended, what is the appropriate penalty?

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 1-3)

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

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.

3. As per *Order on Petition for Agency Review of Order* under date of December 14, 2010 has been found to have violated Section 31A-23a-406(1)(c), Utah Code Ann., 1953, as amended,

DISCUSSION-ANALYSIS

(Paragraphs 1 -7)

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

1. The question(s) presented is:

“The Respondent having violated Utah Code Ann. Section 31A-23a-406(1)(c) what is the appropriate penalty or penalties to be imposed?”

2. Pertinent Statute(s): SEE Utah Code Ann. Section 31A-2-308, subsections (1)(a),(b)(ii) and (11)(a), respectively.

3. a. The original Complaint by the Department in its generic prayer for relief referenced the penalty statute of Section 31A-2-308 and the up to possible \$5,000.00 forfeiture as well as a six months probation “and such other relief as the Presiding Officer might deem just”.

b. At the original hearing on January 12, 2010 the Department referenced a similar “split” closing circumstance that was resolved by a stipulated \$500.00 forfeiture.

c. The Respondent in large measure did not speak to possible penalties based on its stance that no violation occurred.

4. The Commissioner’s *Order on Petition for Agency Review of Order* under date of December 14, 2010 references the chronology of the instant case and on page 25 therein states:

a. “The Presiding Officer found that Guardian did not violate Subsection 406(1)(c) and therefore imposed no penalty. Likewise, had Cooper not been decided, the Review Officer would have upheld the Presiding Officer’s original order. That history argues in favor of leniency in the imposition of a penalty”.

b. “On the other hand, the Department made its views on the interpretation of Subsection 406(1)(c) known over a year before the sale of the real property by the Baxters to Luckau”. (SEE specifically: Bulletin 2007-5 referencing that this bulletin superseded all prior communications with the industry on split escrows.)

5. Additionally the Commissioner in his December 14, 2010 Order states: “Given these seemingly contradictory factors, the Review Officer remands the matter back to the Presiding Officer, directing him to impose the same penalty that would have been imposed had the Presiding Officer ruled that Guardian violated Subsection 406(1)(c)”. (EMPHASIS ADDED.)

6. What the Commissioner (Review Officer) directs is in so many words a “Back to the Future (Past?)” scenario in that the Presiding Officer is directed to take back to January 12, 2010 the December 14, 2010 decision and apply it to the then instant proven (stipulated) facts as to imposition of a penalty(ies).

7. Based on the Commissioner’s direction if as Presiding Officer I had ruled a violation was present I must frankly state such does not seem to be so “heinous” as to impose a \$5,000.00 forfeiture and or six months probation. This being especially true in light of the referenced stipulated \$500.00 forfeiture in a another “split” escrow violation advanced by the Department at the original January 12, 2010 hearing. Additionally there was no evidence of the buyer and or seller in the September 30, 2008 transaction(s) at issue being

aggrieved or harmed. While the “no harm, no foul” approach prevalent in sports world does not hold sway such arguably is a factor. Lastly there is no evidence in the record that the present Respondent is a “bad” actor or producer with if any let alone a litany of similar or other violations of the Utah Insurance Code. What if anything is present is or was a “good faith” presentation of absent the after the fact Cooper decision a sustainable and viable legal position.

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

CONCLUSIONS OF LAW

1. The Utah Insurance Commissioner as per Utah Code Ann. Section 31A-2-308 upon a finding of a violation of “any insurance statute”[herein Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant’s September 22, 2009 Complaint]:

a. “**shall**” in accordance with subsection (1)(a) of Section 31A-2-308 order the forfeiting “to the state twice the amount of any profit gained from the violation, in addition to any other forfeiture or penalty imposed”;

b. “**may**” in accordance with subsection (1)(b)(ii) of Section 31A-2-308 “order any other person [other than an individual] who violated an insurance statute or rule to forfeit to the state not more than \$5,000.00 for each violation”; and

c. “**may**” in accordance with subsection (1)(a) of Section 31A-2-308 “in whole or in part, revoke, suspend, place on probation, limit, or refuse to renew the licensee’s license or certificate of authority (i) when a licensee of the department, other than a

domestic insurer: (A) persistently or substantially violates the insurance law;”.

(EMPHASIS ADDED).

2. The Respondent Guardian Title Insurance Agency of Southern Utah violated Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant’s September 22, 2009 Complaint.

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW
the Presiding Officer herewith makes the following recommended Order:

RECOMMENDED ORDER

**IT IS RECOMMENDED THAT THE TITLE AND ESCROW COMMISSION
IMPOSE THE FOLLOWING PENALTY:**

The Respondent Guardian Title Insurance Agency of Southern Utah having violated Utah Code Ann. Section 31A-23a-406(1)(c) as alleged in the Complainant-Department’s September 22, 2009 Complaint is ordered in accordance with Utah Code Ann. Section 31A-2-308(1)(a),(b)(ii) and (11)(a), respectively, to:

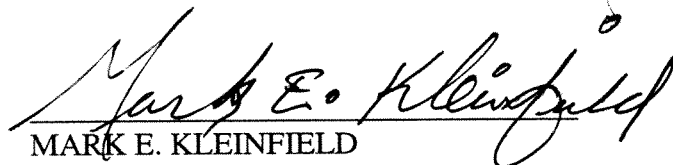
1. Forfeit twice the amount of its profit resultant from Guardian Title Insurance Agency of Southern Utah’s services rendered in relation to the settlement statement dated September 30, 2008 in escrow file no 08-1552W to be paid to the Commission within 30 days of the issuance of the Order;

2. Be assessed an administrative forfeiture in the amount of \$1,000.00 to be paid to the Commission within 30 days of the issuance of the Order; and

3. Be placed on probation for a period of 60 days with the terms of probation being that the Respondent shall have no further violations of the Utah Insurance Code, Department Rules, or any order of the Commission and or Commissioner, commencing on issuance of the Order.

DATED this 22 day of December, 2010.

**NEAL T. GOOCH,
INSURANCE COMMISSIONER**



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

IMPOSITION OF PENALTY

By a vote of:

3, in favor of the recommendation,

to

0, against the recommendation,

taken in open meeting on this date, the Utah Title and Escrow Commission hereby
imposes the penalties recommended in the Order herein above

Dated this 10 of January, 2011.



Cortlund G. Ashton, Chairman
Utah Title and Escrow Commission

NOTIFICATION

You are hereby notified that a failure to obey an Order of the Commissioner may subject you to further penalties, including forfeitures up to \$5,000 per violation and the suspension or revocation of your license and the filing of an action in the district court, which may impose forfeitures of up to \$10,000 per day for continued violation.

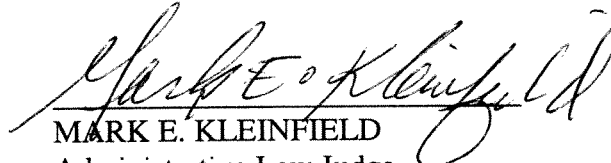
You are further notified that other jurisdictions in which you may be licensed may require that you report this action to them.

CONCURRENCE WITH COMMISSION IMPOSED PENALTY

On behalf of the Commissioner of the Utah Insurance Department I hereby concur with the penalty imposed by the Utah Title and Escrow Commission in the above matter.

DATED this 10 day of January, 2011.

NEAL T. GOOCH
INSURANCE COMMISSIONER


MARK E. KLEINFELD
Administrative Law Judge

AGENCY RECONSIDERATION

Agency Reconsideration of this Order may be obtained by filing a Petition for Reconsideration with the Commissioner of the Utah Insurance Department within twenty (20) days of the date of entry of said Order consistent with Utah Code Ann. Section 63G-4-302(1)(a).

A request for reconsideration need not be sought before pursuing judicial review.

(Section 63G-4-302(1)(a))

JUDICIAL REVIEW

As an “**Formal Hearing**” 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 January, 2011 a true and correct copy of the above and foregoing *ORDER ON REMAND (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

CERTIFICATE OF MAILING

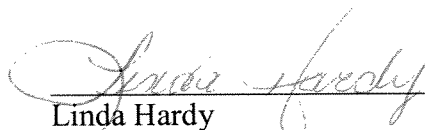
I do hereby certify that on this date I mailed, by regular mail, postage prepaid a true and correct copy of the attached:

ORDER ON REMAND

To the following:

L. Benson Maybey
Attorney At Law
3098 South Highland Drive, Suite 323
Salt Lake City, UT 84106-6001

DATED this 11th day of January, 2011



Linda Hardy
Utah Department of Insurance
State Office Building, Room 3110
Salt Lake City, UT 84114-6901

**UTAH
Invoice**

Printed Date: January 10, 2011

Invoice Date: January 10, 2011
Balance Due: \$1,000.00
Due Date: February 09, 2011
Invoice ID: 493182

GUARDIAN TITLE INSURANCE AGENCY OF SOUTHERN UTAH
1086 SOUTH MAIN PLAZA STE 101
ST GEORGE UT 84770

Item Description	Amount
Monetary Penalty Agency	\$1,000.00
Original Amount Due	<u>\$1,000.00</u>
Payments Received	
	<u>Balance Due</u>

Please note on the check E-Case # 2405

Docket # 2009-124 PC

**UTAH
Invoice**

Printed Date: January 10, 2011

Invoice Date: January 10, 2011
Balance Due: \$1,000.00
Due Date: February 09, 2011
Invoice ID: 493182

Make checks payable to: Utah Insurance Department

Send payment to:

Utah Insurance Department
3110 State Office Building
Salt Lake City, UT 84114-6901