

2001

Millennia Investment Corp. v. Attorneys\ ' Title Guaranty Fund : Brief of Appellant

Utah Supreme Court

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Bruce A. Maak; Paul Drecksell; Parr, Waddoups, Brown, Gee & Loveles; Attorneys for Appellee. Thomas R. Karrenberg; Steven W. Dougherty; Nathan B. Wilcox; Stephen P. Horvat; Anderson & Karrenberg; Attorneys for Appellant .

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IN THE UTAH SUPREME COURT

MILLENNIA INVESTMENT)	
CORPORATION, a Utah corporation,)	
)	
Plaintiff/Appellant,)	
)	Case No. 20010401-SC
vs.)	
)	
ATTORNEYS' TITLE GUARANTY FUND,)	Subject to Assignment to the
INC., a Colorado corporation, and GRANITE)	Utah Court of Appeals
TITLE AND INSURANCE AGENCY, INC.,)	
a Utah corporation,)	
)	Priority No. 10
Defendants/Appellees.)	

BRIEF OF APPELLANT

**APPEAL FROM AN INTERLOCUTORY ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY
HONORABLE J. DENNIS FREDERICK, DISTRICT JUDGE
CIVIL NO. 000902574**

Bruce A. Maak
Paul Drecksell
PARR WADDOUPS BROWN GEE &
LOVELESS
185 South State
Suite 1300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellee
Attorneys' Title Guaranty Fund, Inc.

Thomas R. Karrenberg (3726)
Steven W. Dougherty (0906)
Nathan B. Wilcox (6685)
Stephen P. Horvat (6249)
ANDERSON & KARRENBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant
Millennia Investment Corporation

FILED

OCT 30 2001

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Plaintiff/Appellant,)	
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185 South State
Suite 1300
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Steven W. Dougherty (0906)
Nathan B. Wilcox (6685)
Stephen P. Horvat (6249)
ANDERSON & KARRENBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant
Millennia Investment Corporation

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES	1
<u>Issues</u>	1
<u>Standard of Review</u>	2
DETERMINATIVE PROVISIONS.....	2
STATEMENT OF THE CASE.....	3
<u>Nature of the Case</u>	3
<u>Course of Proceedings and Disposition Below</u>	3
<u>Statement of Facts</u>	4
SUMMARY OF ARGUMENT	11
ARGUMENT.....	14
I. THE TRIAL COURT ERRED IN CONCLUDING THAT SECTION 31A-23-308 VIOLATES ARTICLE I SECTION 24 OF THE UTAH CONSTITUTION, AS THE STATUTE DOES NOT ARBITRARILY TREAT TITLE INSURERS DIFFERENTLY FROM ANY SIMILARLY SITUATED ENTITIES	14
A. <u>Section 31-A-23-308 is presumed constitutional, and ATGF cannot prevail unless it presents evidence establishing beyond a reasonable doubt that the statute violates the constitution</u>	15
B. <u>ATGF failed to demonstrate that section 31A-23-308 violates the uniform operation of laws provision</u>	16

1.	<u>Section 31A-23-308 serves a legitimate legislative purpose: consumer protection</u>	16
2.	<u>ATGF has failed to present evidence establishing that escrow companies, attorneys, and others who provide escrow service are “similarly situated” as compared with title insurers</u>	17
a.	<u>The Heiner Affidavit provides no evidence of similarities between title insurers and other entities</u>	19
b.	<u>The Heiner Affidavit does not even establish that title agents are situated similarly to other escrow providers</u>	23
3.	<u>ATGF has failed to establish that it was unreasonable for the legislature to include title insurers within section 31A-23-308 while not including entities that provide escrow services</u>	25
4.	<u>A statute does not violate equal protection or the uniform operation of laws provision merely because it does not cover all possible evils or because it could have gone further</u>	29
II.	THE TRIAL COURT ERRED IN CONCLUDING THAT SECTION 31A-23-308 VIOLATES ARTICLE I, SECTION 7	32
A.	<u>There is nothing unreasonable about holding title insurers, who hire agents, hold them out to the public, and profit from their activities, liable for the conduct of those agents</u>	32
B.	<u>Imposing strict liability is not unconstitutional, as the law often imposes strict liability</u>	35
III.	THE TRIAL COURT ERRED IN CONSTRUING SECTION 31A-23-308 TO REQUIRE THE TITLE INSURER ITSELF TO PARTICIPATE DIRECTLY IN A TRANSACTION BEFORE BEING HELD LIABLE	38

CONCLUSION	42
CERTIFICATE OF SERVICE	43
ADDENDUM	44

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Aiello v. Ed Saxe Real Estate, Inc.</u> , 499 A.2d 282 (Pa. 1985)	36, 37
<u>Badger v. Brooklyn Canal Co.</u> , 922 P.2d 745 (Utah 1996)	2
<u>Barber v. Anchorage</u> , 776 P.2d 1035 (Alaska 1989)	31
<u>Baker v. Matheson</u> , 607 P.2d 233 (Utah 1979).....	25, 31
<u>Blue Cross and Blue Shield of Utah v. State of Utah</u> , 779 P.2d 634 (Utah 1989)	18, 24, 28
<u>Board of Ed. of Piscataway Twp. v. Caffiero</u> , 431 A.2d 799 (N.J. 1981)	38
<u>Bodell Const. Co. v. Stewart Title Guaranty Co.</u> , 945 P.2d 119 (Utah Ct. App. 1997).....	21
<u>Buzas Baseball v. Salt Lake Trappers</u> , 925 P.2d 941 (Utah 1996)	10
<u>Cameron County Savings Ass'n v. Stewart Title Guaranty Co.</u> , 819 S.W.2d 600 (Tex. App. 1991).....	17
<u>Chicago National League Ball Club v. Thompson</u> , 483 N.E.2d 1245 (Ill. 1985).....	31
<u>Consolidation Coal Co. v. Emery County</u> , 702 P.2d 121 (Utah 1985)	20
<u>Coulter & Smith, Ltd. v. Russell</u> , 966 P.2d 852 (Utah 1998)	2
<u>Division of Consumer Protection v. Rio Vista Oil</u> , 786 P.2d 1343 (Utah 1990)	32
<u>Garland v. Fleischmann</u> , 831 P.2d 107 (Utah 1992).....	17, 36
<u>Gleason v. Seaboard Air Line Ry. Co.</u> , 278 U.S. 349 (1929)	37
<u>Greenwood v. City of North Salt Lake</u> , 817 P.2d 816 (Utah 1991).....	29, 30, 31
<u>Kaneohe Bay Cruises v. Hirata</u> , 861 P.2d 1 (Haw. 1993)	31
<u>Katzenbach v. Morgan</u> , 384 U.S. 641 (1966).....	30

<u>L.R. & C.R. v. State</u> , 967 P.2d 951 (Utah Ct. App. 1998)	15
<u>Lamb v. B & B Amusements Corp.</u> , 869 P.2d 926 (Utah 1993)	15
<u>Lindsley v. Nat'l Carbonic Gas Co.</u> , 220 U.S. 61 (1911)	25
<u>Mountain Fuel Supply Co. v. Salt Lake City Corp.</u> , 752 P.2d 884 (Utah 1988)	15, 18, 28
<u>Mountain States Telephone & Telegraph Co. v. Payne</u> , 782 P.2d 464 (Utah 1989)	37
<u>New York Central R.R. Co. v. White</u> , 243 U.S. 188 (1913)	36
<u>Phillips v. JCM Dev't Corp.</u> , 666 P.2d 876 (Utah 1983)	36
<u>Richards v. Attorneys' Title Guaranty Fund</u> , 866 F.2d 1570 (10th Cir. 1989)	17, 36, 37
<u>State v. Taylor</u> , 541 P.2d 1124 (Utah 1975)	20
<u>State Tax Comm'n v. Dep't of Finance</u> , 576 P.2d 1297 (Utah 1978)	18, 22, 23
<u>Tucson v. Grezaffi</u> , 23 P.3d 675 (Ariz. Ct. App. 2001)	31
<u>Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n</u> , 564 P.2d 751 (Utah 1977)	20
<u>Utah Public Employees' Ass'n v. State</u> , 610 P.2d 1272 (Utah 1980)	15
<u>Warden v. State Bar of California</u> , 982 P.2d 154 (Cal. 1999)	31
<u>Wilkinson v. Union Pacific R. Co.</u> , 975 P.2d 464 (Utah 1998)	5, 15
<u>Williamson v. Lee Optical of Oklahoma</u> , 348 U.S. 483 (1955)	31
Utah Const. art. I, § 7	1, 2, 9, 13, 14, 25, 32
Utah Const. art. I, § 24	1, 9, 11, 12, 14, 18, 19, 23, 25, 31
Utah Code Ann. §§ 7-5-1 <i>et seq.</i>	25

John C. Murray, <u>Insured Closings: Title Company Agents and Approved Attorneys</u> , Practicing Law Institute Handbook Series, PLI Order No. N0-0050, May 2000 (456 PLI/Real 1161)	35
D. Barlow Burke, Jr., <u>Law of Title Insurance</u> § 1.2.3, at 1:28 (2d ed. 1993)	39
National Association of Insurance Commissioners, <u>Title Insurance Agent Model Act</u> § 2(O)(1) (adopted 1995).	39

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(g), (j).

STATEMENT OF ISSUES

Issues

1. Whether the trial court erred in granting partial summary judgment dismissing plaintiff/appellant Millennia Investment Corporation's claim against defendant/appellee Attorneys' Title Guaranty Fund, Inc. (ATGF) for liability under Utah Code Ann. § 31A-23-308, which provides that a title insurer is directly liable for its title agents' mishandling of escrowed funds in transactions where a title insurance commitment or policy has been ordered. (Plaintiff's Memorandum (1) in Support (Reply) of Motion for Partial Summary Judgment Against Defendant Attorneys' Title Guaranty Fund, Inc., and (2) in Opposition to Attorneys' Title Guaranty Fund, Inc.'s Motion for Partial Summary Judgment, R. 680-806 (hereinafter "Opposition Memorandum").)

This issue involves three sub-issues:

a. Whether the trial court erred in concluding that section 31A-23-308, violates article I, section 24 of the Utah Constitution (uniform operation of laws). (Opposition Memorandum, R. 701-07.)

b. Whether the trial court erred in concluding that section 31A-23-308, as written, violates article I, section 7 of the Utah Constitution (due process). (Opposition Memorandum, R. 698-700.)

c. Whether the trial court erred in concluding that because section 31A-23-308 as written purportedly violates article I, section 7, an exception must be read into the statute that a title insurer is not liable unless it directly participates in the transaction at issue, where no such exception appears in the language of the statute itself. (Opposition Memorandum, R. 695-98.)

Standard of Review

In reviewing a trial court's grant of summary judgment, all facts and inferences are viewed in a light most favorable to the nonmoving party (Millennia), and no deference is given either to the trial court's factual conclusions or to its legal conclusions. Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 856 (Utah 1998); Badger v. Brooklyn Canal Co., 922 P.2d 745, 748 (Utah 1996).

DETERMINATIVE PROVISIONS

Utah Const. art. I, § 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. I, § 24:

All laws of a general nature shall have a uniform operation.

Utah Code Ann. § 31A-23-308 (emphasis added):

Any title company, represented by one or more title insurance agents, is directly and primarily liable to others dealing with the title insurance agents for the receipt and disbursement of funds deposited in escrows, closings, or settlements with the title insurance agents *in all those transactions where a commitment or binder for or policy or contract of title insurance of that title insurance company has been ordered, or a preliminary report of the title insurance company has been issued or distributed*. This liability does not modify, mitigate, impair, or affect the

contractual obligations between the title insurance agents and the title insurance company.

STATEMENT OF THE CASE

Nature of the Case

Millennia initiated this action against defendant Granite Title and Insurance Agency, Inc. (Granite Title) and defendant/appellee ATGF to recover over \$400,000 in escrowed funds embezzled by Granite Title, an authorized ATGF title insurance agent. (See generally Amended Complaint, R. 265-78.) Millennia's predecessor deposited the money with Granite Title to fund a loan to be secured by a trust deed on real property purportedly owned by the borrowers, and Granite Title agreed to issue an ATGF policy insuring first position for the trust deed. Instead, the purported owner turned out to be fictitious, and one of Granite Title's owners absconded with the money. Millennia's amended complaint states six claims against ATGF, including a claim for liability under Utah Code Ann. § 31A-23-308, which provides that a title insurer is responsible for its agents' wrongful disbursement of escrow funds if a title insurance commitment or policy has been ordered.

Course of Proceedings and Disposition Below

Millennia initiated this action on March 29, 2000. (Complaint, R. 1-13.) ATGF answered (R. 22-33), but Granite Title's default was taken on July 14, 2000 (R. 195-75), and a default judgment was entered against Granite Title on April 24, 2001 (R. 1056-58). On October 17, 2000, ATGF moved for partial summary judgment, asking the trial court to dismiss Millennia's claim under section 31A-23-308. (R. 283-394.)

On March 6, 2001, the trial court issued a minute entry granting ATGF's motion. (R. 971, 974-75.) A written order granting the motion was formally entered on April 16, 2001. (Order on Cross Motions for Partial Summary Judgment, R. 1025-39, Addendum Exhibit 1 (hereinafter "Order").) On May 7, 2001, Millennia petitioned this Court for interlocutory review of the Order; the Court granted the petition on July 12, 2001.

Millennia had filed its own motion for partial summary judgment in June 2000, asking the trial court to rule that ATGF was liable as a matter of law under section 31A-23-308. (R. 59-184.) The trial court denied Millennia's motion. (Order ¶ B, R. 1026-30, Add. Ex. 1.) Millennia appeals only the granting of ATGF's motion; the denial of Millennia's own motion is not at issue.

Statement of Facts

On approximately June 6, 1999, Raymond Horsley contacted Millennia, requesting that Millennia originate a loan for CMK & Associates and C. Merrill Kent, to be secured by real property located in Summit County. (Affidavit of Dan Jones ¶ 1, R. 833-34.) Horsley, an employee and owner of Granite Title, was a licensed title insurance and escrow agent, appointed and authorized by ATGF to issue title insurance commitments and policies and to provide escrow, closing, and settlement services. (Affidavit of Raymond Horsley ¶¶ 1-2, R. 813.) Granite Title issued title policies for ATGF exclusively. (Horsley Aff. ¶ 4, R. 814-15.)

Millennia worked with White Property No. 2, Ltd. ("White Property"), a Texas-based lender, to arrange the loan. (Jones Aff. ¶ 4, R. 834.) On several occasions, Millennia ordered a title commitment and title insurance policy for White Property.

(Horsley Aff. ¶ 4; R. 814; Jones Aff. ¶ 6, R. 834.) Horsley ultimately gave Millennia a title commitment bearing the stamped signature of Donald T. Walker, Granite Title's chief title officer. (Title Commitment, Ex. D to Horsley Aff., R. 829-32; Horsley Aff. ¶¶ 1, 5, 7; R. 814-15; Jones Aff. ¶ 3, R. 834; Affidavit of Donald T. Walker ¶ 2, R. 365). ATGF authorized Mr. Walker to issue title commitments and policies for ATGF, and ATGF knew Horsley used Mr. Walker's signature stamp to issue title insurance commitments. (Horsley Aff. ¶ 1, R. 813-14.) The commitment stated that "the estate or the interest in the land described or referred to in this Commitment and covered herein is fee simple and title thereto is at the effective date hereof vested in: CMK & Associates." (Commitment, R. 829.) Based upon this title commitment, Millennia agreed to originate the loan and obtain the funds for the loan from White Property. (Jones Aff. ¶ 4, R. 834.)¹

On June 8, 1999, Horsley prepared a settlement statement for the proposed transaction specifying that a title insurance policy from ATGF would be issued to White Property in the amount of \$445,000. (Settlement Statement, Exhibit B to Horsley Aff., R. 818; Horsley Aff. ¶ 4, R. 815.) The same day, White Property sent instructions to

¹ ATGF denies that Horsley was authorized to issue commitments or policies for ATGF, that ATGF knew that Horsley was using Walker's signature stamp, and that the document actually constituted a valid "commitment." Because Millennia is the non-moving party, however, its evidence must be taken as true, and the conflict must be resolved in its favor. See Wilkinson v. Union Pac. R. Co., 975 P.2d 464, 465 (Utah 1998). These factual disputes are not directly material to the appeal, however. The only issue on appeal is the constitutionality of Utah Code Ann. § 31A-23-308, under which a title insurer is liable for its agents' misuse of escrow funds if a commitment is "ordered" in connection with a transaction. Accordingly, whether a valid or enforceable commitment was actually issued is irrelevant.

Granite Title stating that it would wire funds to Granite Title and authorizing Granite Title to disburse the funds "as outlined in the settlement statement." (Escrow Instructions, Exhibit A to Horsley Aff., R. 717; Horsley Aff. ¶ 4, R. 814; Jones Aff. ¶¶ 5-6, R. 834.) White Property ordered from Granite Title a title insurance policy insuring that White Property was in first position on the property. (Escrow Instructions, R. 717.) A promissory note for \$446,634.12 was executed in the name of CMK & Associates and C. Merrill Kent, and a trust deed was executed in CMK's name designating White Property as the beneficiary. (Exhibits 3 and 4 to Jones Aff., R. 842-49.)

While this was taking place, ATGF was aware of questionable dealings by Horsley and Granite Title. As early as April 1999, ATGF was warned by another ATGF agent that Granite Title was improperly insuring loans. (April 27 ATGF Fax to Horsley, Exhibit C to Horsley Aff., R. 819-21.) By May 19, 1999, ATGF had been contacted about Granite Title by both Washington Mutual Bank and the Utah Insurance Department. (See May 19 ATGF Fax to Horsley, Exhibit C to Horsley Aff., R. 822-23.) Indeed, in May ATGF knew that more than three million dollars had been withdrawn from Granite Title's account in the last two weeks of April and that Granite Title owed significant amounts of money to lenders, contractors, and for property taxes. (See id.) Unfortunately, although ATGF described the matter as "very troubling," ATGF allowed Granite Title to continue acting on its behalf. (Id.) Approximately three weeks later, Horsley wrongfully disbursed the funds White Property had wired Granite Title for the CMK loan, contrary to the escrow instructions, and White Prop-

erty lost all of the money it had wired to Granite Title. (Amended Complaint ¶ 18, R. 268; ATGF Federal Court Complaint ¶¶ 39-48, R. 109-110.)

Millennia and White Property subsequently learned that "CMK & Associates" and "C. Merrill Kent" were fictitious. (See ATGF Federal Complaint ¶ 45, R. 109.) In fact, the Summit County property that was purportedly the subject of the trust deed was actually owned by Horsley through a limited liability company he controlled. (Id. ¶ 46.) One month after the funds were improperly disbursed from Granite Title's trust account, ATGF finally terminated Granite Title's authority to act as ATGF's agent. (July 9 ATGF Letter to Horsley, Exhibit C to Horsley Aff., R. 825.)

White Property was only one of several entities whom Horsley had defrauded. (See ATGF Federal Complaint, R. 104-22.) In fact, during the same week that Horsley induced White Property to loan money to be secured by the Summit County property, Horsley also induced two other lenders to loan money to fictitious entities *to be secured by the same property*. (Id. R. 104-06.) In each instance, Horsley falsely represented that fictitious persons or entities owned the property, and in each instance the lenders relied upon Horsley's representations and wired Horsley funds to be held in escrow, which Horsley instead wrongfully disbursed. (Id.) In fact, when ATGF finally bothered to investigate Granite Title, ATGF learned that Granite, through Horsley, had engaged in a number of fraudulent schemes, many involving the same Summit County property, dating back to February 1999. (See ATGF Federal Complaint, R. 104-22.) ATGF also quickly learned that Granite Title had bounced *no less than 143 trust account checks* between May 1998 and June 1999. (Granite Title Trust Account

Records, Exhibit 1 to Affidavit of Brian Coleman, R. 312-58.) Horsley subsequently declared bankruptcy.² (Amended Complaint ¶ 23, R. 269.)

White Property assigned its claims against Granite Title and ATGF to Millennia in February 2000. (Assignment, Exhibit 6 to Affidavit of Alan Combs, R. 182-84.) Subsequently, Millennia initiated this action. (Complaint, R. 1-13.) In June 2000, Millennia moved for partial summary judgment on its first cause of action against ATGF, for liability under Utah Code Ann. § 31A-23-308, which provides that "[a]ny title company . . . is directly and primarily liable to others dealing with the title insurance agents for the receipt and disbursement of funds deposited in escrows . . . with the title insurance agents in all those transactions where a commitment or binder for or policy or contract of title insurance of that title insurance company has been ordered." Millennia presented evidence establishing that (1) Granite Title was ATGF's title insurance agent, (2) White Property deposited funds in Granite Title's escrow account, (3) White Property ordered a title commitment and an ATGF title insurance policy from Granite Title, and (4) the escrowed funds were misappropriated. (Millennia Motion, R. 67-68.)

ATGF opposed Millennia's motion and also filed a cross-motion asking the trial court to dismiss Millennia's section 31A-23-308 claim or, alternatively, to declare that liability under section 31A-23-308 was subject to apportionment under the Comparative

² In October 2001, after the appeal was taken, Horsley was sentenced to 41 months in jail after pleading guilty to charges of felony wire fraud. Also in October 2001, Granite Title declared bankruptcy.

Fault Act. (ATGF Motion for Partial Summary Judgment, R. 283-87.) While ATGF raised numerous factual issues in opposing Millennia's motion, its cross-motion was based entirely on three "Material Undisputed Facts": (1) No one informed ATGF about the White Property transaction, and ATGF did not know about the transaction; (2) ATGF itself was not asked to issue a preliminary report or title insurance policy in connection with that transaction; and (3) entities other than title insurance agents handle escrow closings of real estate transactions in Utah, including lenders, mortgage brokers, real estate brokers, and licensed escrow companies. (Memorandum in Support of ATGF's Motion for Partial Summary Judgment, R. 291-92, Addendum Exhibit 2.)

Based solely on these three alleged facts, ATGF argued that section 31A-23-308 violates Utah Constitution article I, section 24, Utah's uniform operation of laws provision. ATGF also claimed that section 31A-23-308 violates article I, section 7, the due process clause. Finally, ATGF argued that because the statute as written purportedly violates due process, the statute must be "construed" to read that an insurer is not liable unless the insurer actually knew about a particular transaction before its agent stole the escrowed funds. (ATGF Memorandum, R. 289-91.)

In response, Millennia agreed that the three facts set forth in ATGF's cross-motion were undisputed, but Millennia contended that the statute is constitutional because it was rationally related to a legitimate purpose, i.e., the need to protect the public from the harms caused by dishonest title agents like Horsley and Granite Title, and because any classifications the statute draws are likewise rational. Millennia further explained that ATGF's proposed interpretation of the statute was defeated by the

language of the statute itself, and that adding a requirement of actual knowledge by the insurer would render the statute ineffective, as a title agent who sets up a phone transaction to steal escrow funds is not likely to tell the title insurer about the transaction. (Opposition Memorandum, R. 695-707.)

On March 6, 2001, the trial court issued a minute entry denying Millennia's motion and granting ATGF's cross-motion, stating that "Plaintiff's Motion for Partial Summary Judgment is denied for the reasons specified in the opposing memoranda" and "Defendant ATGF's Cross Motion for Partial Summary Judgment is granted for the reasons specified in the supporting memoranda." (Minute Entry Ruling, R. 974-75.) ATGF subsequently prepared an order, which the trial court entered on April 16.³ (Order, R. 1025-39, Add. Ex. 1.) The Order holds that section 31A-23-308 violates the uniform operation of laws provision because it supposedly "treats title insurers differently than other similarly situated entities without a reasonable basis." (*Id.* ¶ B(2), R.

³ In the portion of the Order denying Millennia's partial summary judgment motion, ATGF improperly inserted several "findings" against Millennia, purportedly "based upon the undisputed facts." (See Order ¶¶ A(7)-(11), R. 1027-30, Add. Ex. 1.) Any purported findings, however, are wholly improper. This Court has unequivocally held that trial courts may not make factual findings in ruling on summary judgment motions; instead, courts simply determine whether the moving party has established a right to judgment as a matter of law. See, e.g., Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 946 n.3 (Utah 1996).

Further, the findings are improperly based on disputed evidence. For example, the Order finds that Horsley acted as Millennia's agent during the transaction, simply because Millennia gave Horsley a \$4000 gratuity after the transaction had closed, *even though Horsley himself testified that there was no such agency relationship*. (Compare Order ¶ A(11), R. 1029-30, with Horsley Aff. ¶ 3, R. 814.) Because those findings were made only in conjunction with the ruling on Millennia's motion, however, and not ATGF's motion, those findings have no bearing on this appeal.

1030-31.) The Order also concludes that the statute violates the due process clause "because the statute imposes liability on someone other than the party at fault (here, the title company) which had no knowledge of and could not be expected to have prevented the actionable conduct." (Id. ¶ B(3), R. 1031.) Finally, the Order holds that to avoid the purported due process violation, "the statute must be read to require that the title company issue or distribute a commitment, accept an order for title insurance, or otherwise participate in the transaction before being held liable," and that because ATGF did not directly accept an order or issue a commitment or policy, ATGF could not be liable under the statute.⁴ (Id. (emphasis in original).)

This interlocutory appeal followed.

SUMMARY OF ARGUMENT

The trial court erred in dismissing Millennia's claim against ATGF under Utah Code Ann. § 31A-23-308. First, the trial court erroneously held that section 31A-23-308 violates article I, section 24 of the Utah Constitution. A statute is presumed constitutional and will be upheld unless the statute imposes a classification that bears no reasonable relationship to the achievement of a legitimate legislative purpose. ATGF argued that section 31A-23-308 is unconstitutional because the statute purportedly treats title insurers differently from "similarly situated entities" such as "lenders, mortgage brokers, real estate brokerages, and licensed escrow companies," which provide escrow

⁴ The trial court further stated that because it was dismissing Millennia's claim under section 31A-23-308, the court was not addressing ATGF's argument that such liability would have to be apportioned. (Order ¶ 4, R. 1031.)

services. This argument fails, however, because ATGF presented no evidence that these escrow providers are similar to title insurers; instead, ATGF's evidence compares escrow providers to title agents. Title insurers such as ATGF are not similar to escrow providers such as lenders, brokers, etc., as title insurers have a unique role in the real estate business and generally work through independent agents, so that the common law doctrine of *respondeat superior* may not be sufficient to protect the public. There is also no evidence that escrow providers such as lenders, brokers, etc., pose the same risk of defalcation as title agents do.

In addition to failing to show that other entities are similarly situated to title insurers like ATGF, ATGF has failed to show that it is unreasonable to treat these entities differently. Indeed, it has long been established that insurers may be regulated in the public interest. Moreover, the legislature could have rationally concluded that there was no need to bring escrow providers such as lenders, brokers, etc., within section 31A-23-308, either because those entities do not pose the same threat of defalcation, or because the doctrine of *respondeat superior* is already sufficient to protect the public should such a loss occur, or because title insurers are in a uniquely advantageous position to spread the risks of defalcation to the public through premium rates.

ATGF's argument also fails because a statute is not unconstitutional simply because it does not go as far as it could. Cases from Utah and elsewhere recognize that remedial legislation may address a problem one step at a time and that a legislature may determine that problems posed by one particular field are especially acute and require special regulation. This principle defeats ATGF's article I, section 24 argument.

The trial court also erred in holding that section 31A-23-308 as written violates article I, section 7. To satisfy article I, section 7, a statute need only be rationally related to a legitimate objective, and it was perfectly rational for the legislature to protect the public by holding insurers, who appoint and maintain agents and profit from their agents' activities, liable for their agents' misdeeds. ATGF argued that section 31A-23-308 is unfair because a title insurer supposedly cannot control the acts of its agents, but that is absurd: Like every other principal, a title insurer chooses its agents and has the right to supervise its agents and insist that they demonstrate financial responsibility. Indeed, if ATGF had bothered to supervise Granite Title at all, ATGF would have seen that Granite Title was misusing its escrow account and could have easily prevented the losses that occurred in this case.

Further, ATGF's argument that it is unconstitutional to impose liability without "fault" is meritless, as the law has imposed liability without fault for years. In the standard *respondeat superior* situation, a principal is liable for its agent's actions even if the principal did not know about them. ATGF has not shown that liability under section 31A-23-308 is any different.

Finally, the trial court erred in ruling that because it is unconstitutional to impose liability without fault, an exception must be read into section 31A-23-308 exempting a title insurer from liability if it did not know about the specific transaction in which its agent misused escrowed funds. This reasoning is flawed. As stated in the preceding paragraph, imposing liability on a principal for its agents' actions is plainly not unconstitutional, even if the principal did not know about those particular actions.

Further, the language of the statute does not support ATGF's proposed interpretation, and in fact that interpretation would render the statute utterly meaningless. ATGF's proposed interpretation is based on an inaccurate and misleading view of the title industry: In the title industry, it is the title agents, and not the insurers, that accept commitment orders and issue title policies. Thus, shielding title insurers from liability where they are not directly involved in issuing insurance would mean that the statute would rarely apply at all, thus depriving the public of the protections the legislature intended to provide by enacting the statute in the first place.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING MILLENNIA'S CLAIM AGAINST ATGF UNDER SECTION 31A-23-308.

I. THE TRIAL COURT ERRED IN CONCLUDING THAT SECTION 31A-23-308 VIOLATES ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION, AS THE STATUTE DOES NOT ARBITRARILY TREAT TITLE INSURERS DIFFERENTLY FROM ANY SIMILARLY SITUATED ENTITIES.

In the Order, the trial court held that section 31A-23-308 violates the Utah Constitution's equal protection provision because the statute "treats title insurers differently than other similarly situated entities without a reasonable basis." (Order ¶ B(2), R. 1030-31, Add. Ex. 1.) In particular, the trial court found that the statute treated title insurers differently from "escrow companies, lawyers, banks, mortgage brokers, and real estate agents," whom the trial court concluded also "handle funds in connection with real estate closings and escrows." (Id.) The trial court's reasoning, however, is incorrect.

A. Section 31A-23-308 is presumed constitutional, and ATGF cannot prevail unless it presents evidence establishing beyond a reasonable doubt that the statute violates the constitution.

A statute that does not infringe on a fundamental right or involve a suspect classification will be presumed constitutional and will be upheld against an equal protection challenge unless the party challenging the statute establishes beyond a reasonable doubt that the classification imposed by the legislation bears no reasonable relationship to the achievement of a legitimate legislative purpose. See L.R. & C.R. v. State, 967 P.2d 951, 954 (Utah Ct. App. 1998); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 890 (Utah 1988). Under the rational basis test, a statute will be upheld unless its classifications are *purely arbitrary*. See Utah Public Employees' Ass'n v. State, 610 P.2d 1272, 1273-74 (Utah 1980); Mountain Fuel Supply, 752 P.2d at 888. ATGF thus bears a heavy burden to defeat the presumption that section 31A-23-308 is constitutionally valid.

ATGF's burden is even heavier because ATGF is seeking to sustain a summary judgment. As the party seeking summary judgment, ATGF had the "affirmative burden" to present evidence establishing as a matter of law its right to judgment. Lamb v. B & B Amusements Corp., 869 P.2d 926, 928-29 (Utah 1993); see also Wilkinson v. Union Pac. R. Co., 975 P.2d 464, 465 (Utah 1998). Further, in evaluating ATGF's evidence, all conflicts and all reasonable inferences must be drawn in Millennia's favor. Wilkinson, 975 P.2d at 465.

B. ATGF failed to demonstrate that section 31A-23-308 violates the uniform operation of laws provision.

1. Section 31A-23-308 serves a legitimate legislative purpose: consumer protection.

Section 31A-23-308 was originally enacted in 1981, as part of a comprehensive amendment of the Title Insurance Act of Utah, former Utah Code Ann. §§ 31-25-1 *et seq.* (repealed and recodified in 1985). Former section 31-25-19 (repealed 1985) authorized title insurers, directly or through agents, to perform acts "incidental to the making of any contract or policy of title insurance," including performing escrow, settlement, and closing services. Section 31-25-21 (now § 31A-23-211(3)-(7)) required title agents to be licensed to perform escrow functions. Section 31-25-23 (now § 31A-23-211(1)-(2)) required title agents to obtain fidelity bonds and establish reserve accounts. Section 31-25-25 (now codified in part at § 31A-23-313) imposed recordkeeping and reporting requirements on title agents. Section 31-25-26 (now § 31A-23-307) set forth rules on title agents' handling of escrow funds. Finally, section 31-25-24, now codified as section 31A-23-308, made title insurers directly and primarily responsible for their agents' misappropriation of escrowed funds.

Section 31A-23-308 thus plainly serves the legitimate legislative purpose of consumer protection. By making title insurers responsible for the defalcations of their own agents, section 31A-23-308 ensures that an individual is not subjected to financial ruin by a dishonest title insurance agent. Instead, if a title agent wrongfully disburses funds, the lender or purchaser is protected because the insurer must make up any losses. Section 31A-23-308 thus supplements the traditional agency principle of *respondeat super-*

ior by establishing that when a title agent provides escrow services in connection with a real estate transaction, those escrow services are deemed to be within the scope of its agency, and as such the insurer is directly liable to the injured party. Cf. Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992) ("a principal is liable for the acts of his agent within the scope of the agent's authority").⁵

Security of the public when placing funds in escrow is obviously a legitimate legislative goal. Further, it cannot be disputed that by holding title insurers liable for the defalcations of their agents, section 31A-23-308 does in fact reduce the risk to the public caused by dishonest title insurance agents.

2. ATGF has failed to present evidence establishing that escrow companies, attorneys, and others who provide escrow services are "similarly situated" as compared with title insurers.

ATGF does not dispute that section 31A-23-308 was intended to serve a legitimate purpose, nor does ATGF dispute that section 31A-23-308 furthers that purpose. Instead, ATGF claims that the statute violates equal protection because it applies to title insurers but not to other types of businesses.

⁵ In other jurisdictions, there is a split of authority as to whether escrow services fall within the scope of authority of an agent authorized by a title insurer to issue title insurance. Compare Richards v. Attorneys' Title Guaranty Fund, 866 F.2d 1570, 1574 (10th Cir. 1989) (ATGF liable for theft of escrow funds by president of title insurance agent because escrow was within the scope of agency relationship) with Cameron County Savings Ass'n v. Stewart Title Guaranty Co., 819 S.W.2d 600, 604 (Tex. App. 1991) (insurer not liable because escrow services not within scope of agency). In Utah, section 31A-23-308 has rendered the issue moot. Section 31A-23-308 thus recognizes that escrow services and title insurance are intertwined in the eyes of the public.

To even raise an equal protection argument, however, ATGF must first establish that as a title insurer subject to section 31A-23-308, it is "similarly situated" to entities that are not subject to the statute. See, e.g., Blue Cross and Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989) (purpose of article I, section 24 is to prevent classifications "in such a manner that those who are *similarly situated with respect to the purpose of a law* are treated differently by that law"); Mountain Fuel Supply, 752 P.2d at 888 (article I, section 24 prevents "classifications that result in different treatment being given persons *who are, in fact, similarly situated*"); State Tax Comm'n v. Dep't of Finance, 576 P.2d 1297, 1298 (Utah 1978) ("the court must determine whether such classifications operate equally on all persons *similarly situated*").

ATGF's evidence is insufficient to show that ATGF is similarly situated to any entities that are not covered by section 31A-23-308. The only evidence ATGF cited presented to support its uniform operation argument was paragraph 15 of the Affidavit of Blake T. Heiner, in which Mr. Heiner testified that entities other than title insurance agencies engage in real estate closings:

Escrow closings of real estate transactions in Utah can be, and are, handled by parties *other than title insurance agencies* including lenders, mortgage brokers, real estate brokerages, and licensed escrow companies. Each of these parties can receive and disburse funds for parties to a real estate transaction, but none of these parties issues title insurance commitments or policies. When these parties handle escrow closings and title insurance is desired, the title insurance is secured from a title insurer or title insurance agency that does not perform the escrow closing function.

(Heiner Aff. ¶ 15, R. 390, Addendum Exhibit 3 (emphasis added).) This evidence is insufficient to support the trial court's conclusion that section 31A-23-308 violates article I, section 24.

- a. The Heiner Affidavit provides no evidence of similarities between title *insurers* and other entities.

Most importantly, Mr. Heiner's testimony has nothing to do with title insurers! Mr. Heiner compares lenders, mortgage brokers, real estate brokers, and escrow companies to title insurance agencies. Section 31A-23-308 imposes liability on title insurers, however, not their agents, and ATGF is an insurer, not an agent. Thus, at best, Mr. Heiner's testimony indicates that other entities may provide services similar to those provided by title insurance agents, *but it does not establish that the services provided by the other entities are similar to the services provided by title insurers, or that the other entities are similar in any way to title insurers*. Without evidence that escrow providers are similarly situated to title insurers, ATGF simply cannot demonstrate that distinguishing between title insurers and other entities violates equal protection.

It is axiomatic that title insurers are not similar to other businesses. The most important feature of a title insurer is that it provides title insurance, and *only title insurers provide that service*. In other words, title insurers agree to indemnify a lender or homeowner for losses caused by defects in a title or encumbrances on a property. That service differs vastly from the services provided by lenders, mortgage brokers, real estate brokers, or licensed escrow companies; it would be ridiculous to think that a lender or homeowner would choose the services of a lender, broker, etc. instead of ob-

taining title insurance. Importantly, insurers have long been subject to various regulations and liabilities imposed by legislatures, agencies, and courts, and it is universally accepted that because of the unique role insurers play in society, this differential regulation does not violate equal protection. See, e.g., Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n, 564 P.2d 751, 757 (Utah 1977) (insurance "is properly regarded as an essential service in which the public interest is so involved that it is a legitimate subject of regulation in the interest of the general welfare"); State v. Taylor, 541 P.2d 1124, 1126 (Utah 1975) ("There is nothing unreasonable in the legislative determination to designate the insurance business as a distinct class and to create a separate scheme of taxation therefor."), *partially disavowed on other grounds by Consolidation Coal Co. v. Emery County*, 702 P.2d 121, 127 (Utah 1985).

Indeed, as Mr. Heiner testified, even when someone other than a title agent provides escrow services for a closing, "title insurance is secured from a title insurer or title insurance agency." (Heiner Aff. ¶ 15.) Thus, title insurers are involved in (and profit from) real estate transactions even when their agents do not provide escrow services. It is therefore reasonable for the legislature to distinguish between title insurers, based on their unique role in real estate transactions, and other entities that do not play such a role. Significantly, because section 31A-23-308 applies equally to *all entities that provide title insurance*, the statute does not treat similarly situated entities differently.

Finally, title insurers are unique in that title insurance is marketed primarily through independent agents, who obtain business in part *because they provide escrow*

services. (Notably, chapter 23 of title 31A of the Utah Code is entitled "Insurance Marketing.") That is, instead of seeking out a particular title insurer, a customer (usually a lender or homeowner) wishing to close a real estate transaction will choose someone who can "handle" the entire transaction by preparing closing documents, providing escrow services, researching the title, recording the proper documents, and arranging for title insurance. The title agent will issue insurance through its principal, resulting in income for the insurer.

The agency relationship between the insurer and agent, however, may be expressly limited to issuing insurance. See, e.g., Bodell Const. Co. v. Stewart Title Guaranty Co., 945 P.2d 119, 122 (Utah Ct. App. 1997) (agreement expressly excluded escrow services from title agency relationship). Thus, even though the insurer profits from having an agent that provides escrow and other closing services, the insurer may be able to escape common law liability for the agent's defalcations. See id. at 123-24 (authority to issue title insurance did not imply authority to provide escrow services).⁶ By enacting section 31A-23-308, the legislature has guaranteed that an insurer that profits from its agents' escrow services will be responsible for its agents' actions in

⁶ Indeed, ATGF has claimed below that escrow services were outside the scope of its agency relationship with Granite Title. This argument fails, however, because unlike the agreement in Bodell, the Agency Agreement between Granite Title and ATGF expressly requires the agent to "conduct[] the closing" to earn its premium, and specifically gives ATGF the right to audit and examine Granite Title's escrow accounts. (See Agency Agreement ¶¶ 6, 8(D), R. 87.)

providing those services.⁷

ATGF' attempt to compare itself to escrow providers such as lenders, mortgage brokers, real estate brokers, or independent escrow companies thus makes no sense, as there is no evidence to suggest that lenders, mortgage brokers, etc., market their services through independent agents under limited agency relationships. Nor has ATGF presented evidence that these entities are able to profit from escrow services while escaping common law liability for the acts of those providing the services. Indeed, the Order's reference to "similarly situated principals" was erroneous, as ATGF presented no evidence that such "similarly situated principals" even exist. (Order ¶ B(2), R. 1030, Add. Ex. 1.)

The authority upon which ATGF relied below, State Tax Commission v. Department of Finance, 576 P.2d 1297 (Utah 1978), is distinguishable. In State Tax Commission, the State Insurance Fund, a "private trust fund" providing workers' compensation insurance, was treated differently from other private entities providing workers' compensation insurance. Id. at 1298. The Court expressly found that the State Insurance Fund had the same risks, the same costs, the same rights, and the same liabilities as the

⁷ Of course, not all title insurers work through independent agents. But if a title insurer provides escrow services directly and one of its employees absconds with escrowed funds, the insurer will clearly be liable under the common law doctrine of *respondeat superior*, and as such there is no need for liability under section 31A-23-308.

other workers' compensation insurers. Id. at 1298-99.⁸ Conversely, ATGF has presented absolutely no evidence that title insurers share any similarities with lenders, mortgage brokers, real estate brokers, or escrow companies.

- b. The Heiner Affidavit does not even establish that title *agents* are situated similarly to other escrow providers.

Even if Mr. Heiner's testimony about title agents could somehow be read to apply to title insurers, it still would be insufficient to support ATGF's article I, section 24 claim. There is simply no evidence that the services provided by lenders, brokers, etc. are similar to those provided by title insurance agents, or that the other classes of escrow providers compete with title insurance agents for business. ATGF has also failed to present evidence that the other entities are subject to the same licensing requirements as are title agents or insurers, or that the other entities enjoy the same limitations on competition that title agents enjoy.

⁸ The Court reasoned as follows:

Examples of similarities between the Fund and others within its class include the following. The assets of the Fund exist only to cover the identical obligations covered by private insurers. The Fund has the same administrative costs as private insurers: establishment of premium and hazard rates, procedures for analyzing claims and making disbursements, reinsurance considerations, Fund investment decisions, collection procedures, legal fees and policy issuance. . . . The Fund has the same rights to sue and be sued and make contracts that a private insurer has. The Fund enjoys no immunities not provided to private insurers. The only distinguishable feature is that the Fund is administered by a state agency, the cost therefor being paid from the premiums.

State Tax Comm'n, 576 P.2d at 1298-99.

Additionally, Mr. Heiner's affidavit fails to establish that the risks of defalcation posed by the other types of escrow providers are at all similar to the risks of defalcation posed by title insurance agents. (For example, the risks of defalcation by a lender providing escrow services in its own transaction are nonexistent, as that would mean that the lender is stealing its own escrowed funds.) This flaw is fatal to ATGF's uniform operation argument, as the uniform operation analysis does not apply unless the groups being compared are "similarly situated *with respect to the purpose of a law.*" Blue Cross, 779 P.2d 634 (emphasis added). ATGF acknowledges that the purpose of section 31A-23-308 is to protect the public from the risk of a title insurance agent's defalcation (ATGF Memorandum, R. 294). Therefore, unless ATGF can establish that the other classes of escrow providers are similarly situated *as to the risk of defalcation they pose*, ATGF cannot claim that section 31A-23-308 violates equal protection by applying to title insurers but not escrow providers.

Once again, as the party seeking summary judgment, ATGF was required to present evidence establishing as a matter of law that title insurers and other entities are similarly situated with respect to the purposes of section 31A-23-308. Yet ATGF has established only that entities exist that provide escrow services. This is insufficient to satisfy ATGF's burden.

3. ATGF has failed to establish that it was *unreasonable* for the legislature to include title insurers within section 31A-23-308 while not including entities that provide escrow services.

Treating classes of persons or entities differently does not violate article I, section 24. Instead, a statute violates article I, section 24 only if the statute draws unreasonable distinctions. Further, because a statute is presumed constitutional, the challenging party bears the burden of establishing unreasonableness, and in the absence of evidence showing that a classification is unreasonable, the statute will be upheld. A statute will therefore be upheld if "facts *can reasonably be conceived* which would justify the distinctions or differences in state policy as between different persons." Baker v. Matheson, 607 P.2d 233, 244 (Utah 1979) (emphasis added) (citing Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911)).

Facts can easily be conceived that justify the legislature's decision to include title insurers within section 31A-23-308 but not the other entities Mr. Heiner identifies. First, the legislature could have rationally concluded that there was no need to bring other entities within section 31A-23-308 because those entities simply pose less of a threat of defalcation. Or, more importantly, the legislature could have concluded that even if a defalcation occurs, *respondeat superior* liability is sufficient to protect the public. As explained in the preceding section, because title insurers work through independent agents and can limit the scope of their agency relationships, title insurers can benefit from escrow services being provided while avoiding common law liability for the actions of those providing the services. Because there is no evidence that other

escrow providers work through similarly limited independent agency relationships, the legislature may have reasonably determined that *respondeat superior* principles were enough and that there was no need to ensure direct and primary responsibility through a statute such as 31A-23-308.

Similarly, the legislature may have determined that bringing other escrow providers within section 31A-23-308 was unnecessary because the other escrow providers are subject to regulation in other ways, and those regulations are sufficient to prevent defalcations or protect the public from harm. For example, persons providing independent escrow services in Utah are regulated under Utah Code Ann. §§ 7-22-101 *et seq.*, which requires these persons to maintain a minimum net worth, post surety bonds, and to allow the Department of Financial Institutions to inspect their books at any time. Banks, savings and loan associations, credit unions, and other commercial lenders are regulated under various chapters of Title 7 of the Utah Code, as well as by federal law. Trust companies are regulated under Utah Code Ann. §§ 7-5-1 *et seq.* The legislature could rationally have determined that these statutes and regulations are adequate to protect the public from harm while at the same time minimizing governmental intrusion and allowing for optimal levels of competition.

Section 31A-23-308 is simply part of a broad regulatory scheme that governs *all* escrow providers and their principals in a variety of ways. As the Utah Code itself shows, the legislature has determined that the public interest is served by regulating certain classes of providers certain ways, and by regulation other providers in other ways. For title insurers, the legislature has chosen to encourage self-regulation by

making the insurer directly responsible for the actions or omissions of their agents. Indeed, the legislature has expressly stated that the purposes of the Insurance Code include "encourag[ing] self regulation of the insurance industry" and "encourag[ing] loss prevention as part of the insurance industry." Utah Code Ann. § 31A-1-101(8), (9). ATGF has presented no reason to believe that this legislative decision was improper.

The legislature may also have rationally decided that it was reasonable to focus section 31A-23-308 on title insurers because of their unique and extensive role in the real estate business or their status as a participant in a controlled market. A company may not write title insurance in Utah unless that company is authorized to do so by the Department of Insurance. See, e.g., Utah Code Ann. §§ 31A-5-212(1)(a) (domestic insurer may apply for certificate of authority to engage in insurance business); 31A-14-201(1)(a) (foreign insurer may apply for certificate of authority). By licensing a company to provide those services, then, the state grants a title insurer the right to participate in a lucrative market with only limited competition. It would thus be perfectly reasonable for the legislature to conclude that as a condition of receiving this privilege, a title insurer must be willing to stand behind the agents it holds out to the public.

Other reasons exist that justify the decision to focus section 31A-23-308 on title insurers. For example, the legislature may have determined that title insurers, because of the broad scope of their business, are best suited to spread the risks of defalcations to the public through increased premium rates or other service charges. Or the legislature may simply have determined that the burdens of imposing direct liability on other classes of escrow providers outweigh the benefits of such liability. Each of these rea-

sons is plausible, and each of these reasons justifies the limited focus of section 31A-23-308.

In addressing the reasonableness of the statutory classification, it is important to note that ATGF has presented no evidence that section 31A-23-308 has interfered with its ability to engage in business. "[T]he impact of a measure can be relevant to determining whether the legislative body has exceeded the bounds of the broad discretion it has in fashioning purely economic legislation." Blue Cross, 779 P.2d at 643. See also Mountain Fuel Supply, 752 P.2d at 888 (purpose of uniform operation and equal protection provisions is to prevent classifications that "redound[] to the detriment of some of those so classified"). ATGF presented no evidence that in the 20 years since 31A-23-308's predecessor was enacted, title insurers have lost a single customer as a result of the liability the statute imposes. Nor has ATGF presented evidence that title insurers are unable to pass the costs section 31A-23-308 imposes onto their customers. Cf. Mountain Fuel Supply, 752 P.2d at 891 (challenged tax does not unduly burden Mountain Fuel Supply because "the tax is passed directly through to consumers," because Mountain Fuel retained the "overwhelming majority of heating fuel consumers," and because Mountain Fuel "encounters relatively little administrative cost in collecting the tax"). Indeed, it is doubtful that section 31A-23-308 could affect title insurers' business because there is no real substitute for the services title insurers provide (i.e., title insurance), and because the liability of section 31A-23-308 applies equally to all who provide title insurance in Utah.

4. A statute does not violate equal protection or the uniform operation of laws provision merely because it does not cover all possible evils or because it could have gone further.

Boiled down to its essence, ATGF's complaint is that the legislature violated the constitution by protecting the public from dishonest title agents while not protecting the same way against dishonest lenders, mortgage brokers, real estate brokers, or licensed escrow companies. ATGF thus argued, and the trial court ruled, that if the legislature does not protect the public the same way against all potential wrongdoers, then it may not protect against any potential wrongdoers. Given that it would be nearly impossible to regulate against all possible causes of a problem, or that someone could always claim that an unregulated group is similarly situated to a regulated group, the trial court's reasoning would prevent the legislature from providing any protection at all.

Fortunately for the citizens of this state, this Court has expressly rejected the trial court's reasoning and has held that "*a law is not made unconstitutional simply because it does not cover all possible evils.*" Greenwood v. City of North Salt Lake, 817 P.2d 816, 821 (Utah 1991) (emphasis added). In Greenwood, the Court concluded that a municipal ordinance that strictly regulated bull terriers ("pit bulls") did not violate equal protection even though the ordinance did not cover certain other potentially dangerous breeds of dogs. The ordinance required special licensing, confinement, and insurance requirements for dogs classified as "fierce, dangerous, or vicious," defining pit bulls as "vicious animals." The plaintiffs (pit bull owners and a breeders' association) challenged the ordinance on several grounds, including article I, section 24, arguing

that the ordinance "is underinclusive and therefore violates equal protection because of the many breeds which are not included." Id. at 821. In upholding the ordinance, the Court explained that "*a statute is not invalid under the Constitution because it might have gone farther than it did, [] a legislature need not strike at all evils at the same time, and [] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.*" Id. (emphasis added) (quoting Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (internal citations and punctuation omitted)).

Greenwood defeats ATGF's claim that section 31A-23-308 is unconstitutional because it applies to one class of businesses, title insurers, but does not apply to other businesses such as lenders or mortgage brokers. As in Greenwood, the legislature has determined that one particular class (or "breed") of escrow providers poses a heightened risk to the public, and that remedial measures are necessary to protect the public from those risks. The legislature has not deemed it necessary, however, to effect those remedial measures in connection with other classes of providers, either because the other classes do not impose the same risks or because the burdens of imposing the measures on the other providers would outweigh the benefits of such regulation. In Greenwood, the court ruled that it was improper to second-guess the legislative determination that pit bulls should be subject to strict regulation but not other dogs. It was likewise

improper for the trial court in the instant case to second-guess the legislative determination that section 31A-23-308 should apply only to title insurers.⁹

"Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Baker, 607 P.2d at 243-44 (quoting Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955) (internal citations omitted)). Section 31A-23-308 plainly does not violate article I, section 24.

⁹Courts from other states, applying reasoning similar to Greenwood's, have also refused to strike down remedial statutes on the ground that they are allegedly under-inclusive. For example, the California Supreme Court upheld the State Bar's CLE requirements, even though certain groups (such as retired judges and law professors) were exempt from those requirements. See Warden v. State Bar of California, 982 P.2d 154, 164 (Cal. 1999) ("[T]he state . . . properly may limit a regulation to those classes of person as to whom the need for regulation is thought to be more crucial or imperative."). Similarly, the Hawaii Supreme Court upheld a statute limiting commercial operation of "thrill craft" in certain bays while allowing unlimited recreational use. See Kaneohe Bay Cruises v. Hirata, 861 P.2d 1, 8 (Haw. 1993) ("[I]t is reasonable that the legislature, in the instant case, could have determined that the most prudent and measured response to the problem of water safety and environmental preservation in the Bays involved the prohibition of commercial thrill craft operations at the present time."). See also Barber v. Anchorage, 776 P.2d 1035, 1039-40 (Alaska 1989) (upholding ordinance prohibiting portable advertising signs but allowing permanent ones); Tucson v. Grezaffi, 23 P.3d 675, 681-83 (Ariz. Ct. App. 2001) (upholding ordinance requiring restaurants to provide non-smoking sections, even though ordinance did not apply to similarly situated entities such as bars, bowling alleys, or billiard halls); Chicago National League Ball Club v. Thompson, 483 N.E.2d 1245, 1249-52 (Ill. 1985) (upholding noise pollution law prohibiting major league baseball team from playing night baseball games in city, even though statute allowed city's other major league team to continue playing night games).

II. THE TRIAL COURT ERRED IN CONCLUDING THAT SECTION 31A-23-308 VIOLATES ARTICLE I, SECTION 7.

The trial court concluded that section 31A-23-308 violates the Utah Constitution's due process clause because the statute purportedly "imposes liability on someone other than the party at fault (here, the title company) which had no knowledge of and could not be expected to have prevented the actionable conduct." (Order ¶ B(3), R. 1031, Add. Ex. 1.) Once again, the trial court erred, as ATGF failed to establish that it is irrational to impose liability on a title insurer for the acts and omissions of its agents. Indeed, the trial court's reasoning is flawed because the liability imposed by section 31A-23-308 is little different from the vicarious liability the law imposes on every principal, which is universally accepted as proper.

A. There is nothing unreasonable about holding title insurers, who hire agents, hold them out to the public, and profit from their activities, liable for the conduct of those agents.

Applying section 31A-23-308 in the instant case, where ATGF denies knowing that a title insurance policy was ordered from Granite Title, does not violate Utah's due process clause, because imposing strict liability in this instance is neither irrational nor fundamentally unfair. Because section 31A-23-308 does not invade fundamental rights, it is presumed constitutional and will be overturned only if the statute is not "reasonably related to the achievement of any conceivable legislative objective." Division of Consumer Protection v. Rio Vista Oil, 786 P.2d 1343, 1350 (Utah 1990) (emphasis added). Rio Vista further explains that "[i]t is axiomatic that statutes are presumed to be constitutional and that the party challenging a statute's constitutionality bears the burden of

proving that it is invalid. . . . *This burden is especially heavy when attacking an economic measure.*" Id. at 1349-50 (emphasis added).

Once again, section 31A-23-308 is rationally related to a legitimate governmental objective, as the statute protects real estate purchasers and lenders if a title insurance agent fails to disburse funds as instructed. Indeed, the trial court did not find that the statute failed to achieve a legitimate objective; instead, the trial court concluded that the statute was unconstitutional simply because it imposed liability "on someone other than the party at fault." (Order ¶ B(3).) The trial court thus made a policy decision disguised as a constitutional one.

Section 31A-23-308 simply reallocates the risks of an agent's malfeasance from the innocent person who entrusted funds with a title agent to the insurer whose agent lost or stole those funds. It was perfectly rational for the legislature to conclude that as between the innocent depositor (who has no control over the escrow agent) and the title insurer (who hires the agent, markets its services through the agent, holds the agent out to the public as the insurer's representative, has the right to inspect the agent's records and terminate the agent, and profits from the agent's activities), fairness requires placing the risks of an agent's malfeasance on the insurer. It was also perfectly reasonable for the legislature to conclude that an insurer is in a better position to handle those risks by requiring security from its agents, supervising its agents, and/or spreading the risks to the public.

Indeed, a fundamental premise of the trial court's ruling, that ATGF could not have prevented the losses resulting from its agent's defalcation of escrowed funds, is

flatly wrong. (See Order ¶ B(3), Add. Ex. 1.) Notably, ATGF submitted no evidence that it could not have prevented the losses that resulted from Granite Title's misuse of the funds White Property placed in escrow, and without such evidence, ATGF is not entitled to summary judgment. Further, the trial court's conclusion is incorrect on its face because ATGF easily could have prevented the losses. While ATGF may not have been able to totally prevent Granite Title from doing a particular act, ATGF could have significantly reduced the likelihood of such an occurrence by investigating Granite Title before authorizing it to act as ATGF's agent, investigating Granite Title's employees to make sure they could be trusted with handling the public's money, and supervising Granite Title to ensure it maintained proper business practices. Indeed, Granite Title had been misusing its escrow account for *over a year* before the White Property transaction took place, and if ATGF had exercised its right to look at Granite Title's bank statements (See Agency Agreement ¶ 6, R. 87), ATGF could have stopped Granite Title's activities before White Property was defrauded.

Not only could ATGF have acted to reduce the likelihood of misappropriation, but ATGF also could have taken basic steps to ensure that such an occurrence did not harm the public by requiring Granite Title to post a bond, maintain fidelity insurance, and/or demonstrate financial responsibility. Thus, White Property and the other persons Granite Title defrauded would have been protected against the consequences of Granite Title's schemes. ATGF always had the right to terminate Granite Title as its agent if Granite Title failed to maintain proper financial protections or otherwise acted improperly, and ATGF could have protected the public simply by exercising that right.

Section 31A-23-308's self-regulation does not impose an extraordinary burden or one that title insurance companies do not readily accept in order to market their insurance services. See John C. Murray, Insured Closings: Title Company Agents and Approved Attorneys, Practising Law Institute Handbook Series, PLI Order No. N0-0050, May 2000 (456 PLI/Real 1161). Section 31A-23-308 is nothing more than statutory codification of the contractual "closing protection letters" many title insurers, including ATGF, routinely provide lenders. These closing protection letters are "intended to indemnify lenders against losses as the result of negligence, dishonesty, fraud, bad faith, defalcation by the approved agent or attorney, and failure of the agent or attorney to comply with the written closing instructions of the lender, . . . including disbursement of funds." Id. at 1164-65.

B. Imposing strict liability is not unconstitutional, as the law often imposes strict liability.

ATGF's position that it is unconstitutional to impose liability without actual knowledge of the actionable conduct simply ignores legal reality. Liability is imposed on persons without direct knowledge of actionable conduct all the time. See, e.g., Utah Code Ann. §§ 78-15-1 *et seq.* (imposing liability on the manufacturer of a defective product even if the manufacturer did not know about a defect and could not have prevented it); Restatement (Second) of Torts §§ 519-524A (imposing strict liability on those who engage in ultrahazardous activities). Further, an employer is liable for the negligent acts of its employees committed within the scope of employment, even if the employer did not know of the acts and could not have prevented them. See Restate-

ment (Second) of Agency § 219. Indeed, it has been universally accepted for decades that statutes imposing liability without fault are not unconstitutional:

[L]iability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained.

New York Central R.R. Co. v. White, 243 U.S. 188, 204 (1913) (emphasis added) (holding New York's workers' compensation law constitutional).

The trial court's reasoning also conflicts with the fundamental principle of agency law that *a principal is liable for the acts of its agent within the scope of the agency*. E.g., Garland, 831 P.2d at 110; Phillips v. JCM Dev't Corp., 666 P.2d 876, 881 (Utah 1983). Because the principal chooses the agent and holds him or her out to the public, justice demands that the principal be responsible for the agent's actions: As between the party who hired the agent and an innocent victim, the risks of the agent's misdeeds should fall on the party who hired the agent. See, e.g., Richards v. Attorneys' Title Guaranty Fund, 866 F.2d 1570, 1572-73 (10th Cir. 1989) (*respondeat superior* liability is based on the principle that "when one of two innocent persons must suffer from the acts of the third, he must suffer who put it in the power of the wrongdoer to inflict the injury."); accord Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 285 (Pa. 1985). No one would seriously contend that imposing liability on a principal for an agent's acts violates due process. Yet, the liability imposed by section 31A-23-308 is no different.

Thus, while ATGF complained that section 31A-23-308 imposes liability upon it even though ATGF did not know about the particular transaction between Granite Title and White Property, ATGF failed to explain how ATGF's position is any different from any other principal. In the standard *respondeat superior* situation, the principal's liability does not depend on his or her own fault. E.g., Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 356 (1929) ("Few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own."). Nor does liability depend on whether the employer or principal knew about the agent's specific act. E.g., Richards, 866 F.2d at 1572 (10th Cir. 1989) ("The principal's knowledge of the agent's tort is not a necessary element of liability."). Indeed, the principal remains liable "*even if he forbade the acts or disapproved of them.*" Aiello, 499 A.2d at 285 (emphasis added). Thus, with respect to the principal's knowledge and ability to control, the liability imposed by section 31A-23-308 is no different from ordinary *respondeat superior* liability, and it is palpably absurd for ATGF to suggest that applying the statute in this instance would violate due process.

Because liability under section 31A-23-308 is so similar to ordinary *respondeat superior* liability, Mountain States Telephone & Telegraph Co. v. Payne is inapposite. 782 P.2d 464 (Utah 1989). In Payne, this Court suggested that it might violate due process to hold a corporate employee personally liable for signing a subsequently dishonored company check if the employee did not know the check was bad. The situation in Payne, however, was the reverse of the situation in this case: Payne

involved holding the *agent* liable for the *principal's* misdeeds, while the instant case involves holding a *principal* liable for its *agent's* misdeeds. Payne holds that it would be arbitrary and unfair to hold an agent liable for his or her principal's actions without knowledge, but as established in the preceding section, it is universally accepted that it is perfectly appropriate to hold a principal liable for the acts or omissions of his or her agent.¹⁰

III. THE TRIAL COURT ERRED IN CONSTRUING SECTION 31A-23-308 TO REQUIRE THE TITLE INSURER TO PARTICIPATE DIRECTLY IN A TRANSACTION BEFORE BEING HELD LIABLE.

Based entirely on its ruling that section 31A-23-308 violates due process because it imposes liability without "fault", the trial court ruled that even though section 31A-23-308 by its own terms applies in "all" transactions where a commitment or title policy has been "ordered", an exception must be read into the statute exempting a title insurer from liability unless the insurer actually accepts an order, personally issues a commitment or policy, or directly participates in the transaction in some other way. The trial court's interpretation of section 31A-23-308, however, is patently incorrect.

¹⁰ ATGF also relied below upon out-of-state parental liability cases to support its argument that strict or vicarious liability statutes are unconstitutional, but those cases do not help ATGF. First, as an obvious matter, the relationship between ATGF and Granite Title is nothing like the relationship between a parent and a child. Unlike a parent, ATGF expressly chose Granite Title to act as its agent, ATGF derives a profit from Granite Title's activities, and ATGF has the right to terminate its relationship with Granite Title if ATGF does not like the way Granite Title was doing business. Second, the overwhelming majority of cases hold that parental liability statutes do not violate the due process clause. See, e.g., Board of Ed. of Piscataway Twp. v. Caffiero, 431 A.2d 799 (N.J. 1981).

First, the statute must be interpreted according to its plain language, which itself defeats the trial court's interpretation. The statute, by its own terms, applies whenever a title policy has been "ordered". The statute does *not* require that an order be accepted by the insurer or a policy actually issued by the insurer.

Indeed, such an interpretation would make no sense, because *title insurers do not accept commitment orders or issue policies*. Instead, it is the title agents, not the insurers, that "accept" policy orders and "issue" title policies. "The pattern of the so-called national title insurers . . . is to authorize the issuance of policies by local agents. . . . [¶] *Escrow companies are authorized to issue title insurance commitments and policies in the name of the insurer.*" D. Barlow Burke, Jr., Law of Title Insurance § 1.2.3, at 1:28 (2d ed. 1993) (emphasis added). The National Association of Insurance Commissioners, a national body that drafts model laws covering all aspects of the insurance business, even defines a "title insurance agent" as a person who "on behalf of the title insurer . . . [d]etermines insurability and *issues title insurance reports or policies, or both*, based upon the performance or review of a search, or an abstract of title." National Association of Insurance Commissioners, Title Insurance Agent Model Act § 2(O)(1) (adopted 1995) (Addendum Exhibit 4).

ATGF's own practice follows the national model: ATGF's agents, not ATGF, issue title commitments and title policies. Indeed, ATGF's Agency Agreement with Granite Title states that it is Granite Title's responsibility to conduct title searches, perform title examinations, "*prepare[] and issue[] all title products,*" and "*issue[] a final title policy.*" (Agency Agreement ¶ 8, R. 87, Addendum Exhibit 5 (emphasis added).)

Moreover, the Agency Agreement recognizes that ATGF may not even learn that an agent has issued a commitment or policy until *until as late as 30 days after the closing*. (See id. ¶ 8(G).) ATGF's vice president admits that certain individuals at Granite Title were "authorized to issue commitments for [and] policies of title insurance on behalf of ATGF" (Affidavit of Brian A. Coleman ¶ 6, R. 307), and ATGF knew Horsley was issuing ATGF title commitments using an approved signature stamp of an attorney agent of ATGF. (Horsley Aff. ¶¶ 1, 2, 4, R. 813-14.) It defies logic to suggest that the insurer must itself issue the title commitment or policy for the statute to apply, when the title insurance business does not even operate that way.¹¹

Second, requiring that an insurer directly participate before being held responsible for an agent's defalcation would vitiate the protections of the statute. Section 31A-23-308 is intended to protect the public from the misdeeds of a dishonest title agent. If a title agent is going to embezzle settlement funds, however, it is highly doubtful he or she will bother to inform the insurer that title insurance was ordered. Thus, requiring that the insurer be expressly notified of a particular order would insulate the insurer from liability for the misconduct of an embezzling agent who would not want to disclose his or her wrongful conduct. In other words, ATGF's proposed interpretation of section 31A-23-308 would render the statute a nullity in almost every transaction the statute is designed to protect!

¹¹ In other words, ATGF has willingly chosen to allow its agents to issue policies without ATGF's knowledge. It is therefore disingenuous for ATGF to argue that it would violate due process to impose liability on it for the White Property transaction merely because ATGF did not know that a policy had been ordered in that transaction.

Third, interpreting the statute to require the insurer to receive notice of an order would be pointless, because informing the insurer of a particular order would not lead to any additional protections for the public. Once again, insurers generally do not learn of transactions until after they occur, but even if a title insurer were to learn that insurance was requested on a certain property, there is no reason to think the insurer would be able to use that knowledge to prevent a loss. For the insurer to prevent the loss, the insurer must be able to determine that the title agent intends to embezzle escrowed funds, but it is highly doubtful that the insurer could make this determination simply by learning that a particular lender wanted to insure a particular property.¹² And because large title insurers such as ATGF undoubtedly issue hundreds or thousands of title policies a year, it is even more far-fetched to think that an insurer would notice anything about any one particular transaction.

Nothing in section 31A-23-308 requires direct participation by an insurer for liability to attach, and reading such a requirement into the statute would frustrate the very purpose of the statute. Moreover, because placing the responsibility on the insurer for its agent's misdeeds does not violate due process, there is no reason to force such a tortured and illogical reading into the statute. The statute should thus be interpreted as written: The title insurer is liable for its agent's misuse of escrowed funds if

¹² Instead, the most effective way for an insurer to learn if a title agent poses a particular risk of defalcation is for the insurer to audit the records of its agents! As pointed out above, Granite Title's trust account had been overdrawn for more than a year, as a simple investigation would have shown. Thus, ATGF *already had* access to the information that could have been used to prevent or minimize losses.

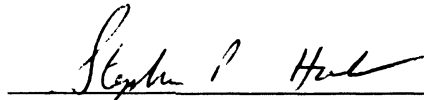
a title insurance commitment or policy has been "ordered." Because White Property ordered a title commitment from Granite Title, ATGF's agent, section 31A-23-308 makes ATGF liable for Granite Title's misuse of the escrowed funds. Accordingly, Millennia has a claim under section 31A-23-308.

CONCLUSION

Appellant Millennia Investment Corporation therefore respectfully requests that the Court enter an order reversing the portion of the trial court's Order dismissing Millennia's claim against ATGF for liability under Utah Code Ann. § 31A-23-308.

RESPECTFULLY SUBMITTED this 30th day of October, 2001.

ANDERSON & KARRENBURG



Thomas R. Karrenberg

Steven W. Dougherty

Nathan B. Wilcox

Stephen P. Horvat

Attorneys for Plaintiff/Appellant

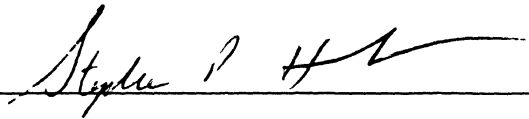
Millennia Investment Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2001, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

Bruce A. Maak
Paul Drecksell
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State, Suite 1300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellee
Attorneys' Title Guaranty Fund, Inc.

Perri Ann Babalis
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorney for Intervenor State of Utah



ADDENDUM

1. Order on Cross-Motions for Partial Summary Judgment, April 17, 2001, R. 1025-39.
2. Memorandum in Support of ATGF's Motion for Partial Summary Judgment, October 17, 2001 (portions), R. 288, 291-92, 303.
3. Affidavit of Blake T. Heiner, October 16, 2001 (portions), R. 384, 390-91.
4. National Association of Insurance Commissioners, Model Laws, Regulations and Guidelines, Agents/Brokers/Procedures, Title Insurance Agent Model Act (adopted 1995).
5. Agency Agreement, R. 87-89.

Tab 1

FILED DISTRICT COURT
Third Judicial District

Bruce A. Maak, Of Counsel (2033)
Paul C. Drecksal (5946)
PARR, WADDOUPS, BROWN, GEE & LOVELESS
Attorneys for Defendant
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: 801-532-7840
Fax: 801-532-7750

APR 17 2001

By C. Baerley SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MILLENNIA INVESTMENT CORPORATION,)	
)	ORDER ON CROSS-MOTIONS FOR
)	PARTIAL SUMMARY JUDGMENT
Plaintiff,)	
)	
vs)	Civil No. 000902574 CN
)	
ATTORNEYS TITLE GUARANTY FUND, INC., et al.,)	Judge: J. Dennis Frederick
)	
Defendant.)	

The Motion for Partial Summary Judgment of plaintiff Millennium Investment Corporation, a Utah corporation ("Millennia") dated June 30, 2000 and the Motion for Partial Summary Judgment of Attorneys Title Guaranty Fund ("ATGF") dated October 17, 2000 came on regularly for hearing before the Court, the Honorable J. Dennis Frederick presiding at 9:00 a.m. on February 26, 2001, Millennium appearing through its counsel, Thomas R. Karrenberg, Stephen W. Dougherty, and Nathan B. Wilcox, and ATGF appearing through its counsel, Paul C. Drecksal and Bruce A. Maak, and the Court having reviewed the file and pleadings and the materials

submitted by the parties with respect to both Motions, having heard argument of counsel, being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ruled and ordered as follows:

A. Millennia's Motion for Partial Summary Judgment. Millennia's Motion for Partial Summary Judgment sought partial summary judgment adjudicating ATGF's liability for \$433,625.00 in principal and interest thereon based upon Millennia's positions that Millennia was the assignee of White Properties ("White"), and White deposited \$433,625.00 into an escrow account with Granite Title, White allegedly ordered and paid for a title policy from ATGF, and Granite Title misappropriated the deposited funds, as a result of which Millennia claims ATGF is liable to it under Utah Code Ann. §31A-23-308. Millennia submitted the Affidavit of Alan Combs dated June 30, 2000 in support of its Motion ("Combs Affidavit"). Thereafter, Millennia submitted the Affidavits of Raymond Horsley dated November 8, 2000 ("Horsley Affidavit"), the Affidavit of Dan Jones dated November 21, 2000 ("Jones Affidavit"), and the Affidavit of Lewis Livingston dated November 10, 2000 ("Livingston Affidavit"). ATGF moved to strike portions of the Combs and Livingston Affidavits. The Court rules and orders as follows with respect to Millennia's Motion for Partial Summary Judgment and ATGF's Motions to Strike Portions of the Combs and Livingston Affidavits:

1. ATGF's Motion to Strike Portions of the Combs Affidavit is hereby granted. Paragraphs 2 through 9 of the Combs Affidavit are inadmissible and must be stricken because they fail to comply with Utah Rules of Civil Procedure Rule 56(a), the affiant lacked personal knowledge of the matters stated therein, the statements contained therein lack foundation, the statements therein mischaracterize the evidence, the statements therein improperly describe the

contents of documents in violation of the best evidence rule, and the statements therein constitute improper legal conclusions.

2. Paragraphs 2 through 9 of the Combs Affidavit be and the same are hereby stricken.

3. ATGF's Motion to Strike the Livingston Affidavit be and the same is hereby granted. Paragraphs 4, 5, 6, 8, 10, and 11 of the Livingston Affidavit must be stricken pursuant to Utah Rules of Civil Procedure Rule 56(e) and applicable law because they contain impermissible representations regarding legislative history, conclusory statements without evidentiary foundation, and inadmissible legal opinions.

4. Paragraphs 4, 5, 6, 8, 10, and 11 of the Livingston Affidavit be and the same are hereby stricken.

5. The evidentiary materials submitted by ATGF give rise to multiple genuine issues of material fact which preclude the granting of Millennia's Motion for Summary Judgment, and Millennia failed to demonstrate by admissible evidence an entitlement to summary judgment.

6. As set forth in greater detail below under paragraph B.2 and B.3, Utah Code Ann. §31A-23-308 is unenforceable as a matter of law because it is violative of equal protection and due process clauses of the Utah Constitution and/or if constitutionally construed, that statute does not apply to the facts presented here.

7. Attached hereto marked Exhibit 1 is a five page document alleged by Millennia to constitute a commitment for title insurance that fulfills the requirements of Utah Code Ann. §31A-23-308. Based upon the undisputed facts, Exhibit 1 does not constitute a commitment or binder for or policy or contract of title insurance of ATGF or a preliminary report of ATGF

within the meaning of Section 31A-23-308 for each of the following independent reasons (i) Exhibit 1 does not mention ATGF, Exhibit 1 on its face states that it is enforceable only if a cover is attached, and no cover was attached, Exhibit 1 does not contain essential elements required to form a commitment to issue title insurance because it contains no commitment or agreement to issue a policy, and does not identify a proposed insured; (ii) Exhibit 1 does not qualify as a binder or commitment under the governing statutes, which require that a binder or commitment contain a description of the subject and amount of insurance; (iii) Exhibit 1 is too indefinite to create an enforceable contract because it lacks essential material terms, including the amount of insurance to be provided, the amount of the insurance premium, and the name of the insured, and (iv) Exhibit 1 was not issued with respect to the transaction in connection with which the funds in question were misappropriated

8. There exist disputed issues of material fact as to whether Millennia/White ever orally or by letter requested or ordered a policy of title insurance of ATGF at all. Based upon the undisputed facts, however, there was no ordering of a commitment, binder, policy or contract of title insurance within the meaning of Utah Code Ann Section 31A-23-308 because no enforceable order was received by ATGF. To constitute such an enforceable order, the order must have been written, contain all essential terms, and be accepted by ATGF, none of which occurred here.

9. Based upon the undisputed facts, Millennia and White looked to Horsley (who was an employee of Granite Title), individually to perform for Millennia/White functions relating to the origination of the subject loan, to act as a loan broker, to negotiate with the borrower with respect to the loan, and to perform due diligence. White and Millennia also expected Horsley to

handle the closing of the subject loan as a Granite Title employee and in that capacity arrange for the issuance of a title insurance policy as the agent of a title insurance company White and Millennia's deposit of funds with Horsley, who was performing acts both as an employee of Granite Title and separately and individually for Millennia/White, is not a transaction intended to be covered by Utah Code Ann. §31A-23-308, even assuming it were constitutional

10 Based upon the undisputed facts, Millennia and White were aware that Horsley was individually accepting a substantial payment from them in connection with a transaction in which they expected Horsley to act as an employee of Granite Title in handling the closing and arranging for the issuance of a title policy. Millennia and White's causing or allowing Horsley to undertake duties for both Granite Title and separately for them, coupled with ATGF's ignorance of those matters, created a conflict of interest and breach of the duties that Horsley owed Granite Title and through it to ATGF. ATGF is entitled to rescission of any commitment, binder, policy or contract of title insurance or preliminary report that was issued, assuming such issuance occurred in this case, which did not in fact occur.

11 Based on the undisputed facts, Horsley acted on behalf of White and Millennia in originating their loan, performing due diligence on their loan, and handling all contact with the prospective borrowers concerning the loan and closing and was individually paid a \$4,000.00 fee upon closing by Millennia/White. Those actions were not within the scope of Horsley's authority with Granite Title or Granite Title's authority with ATGF. Horsley knew the fraudulent nature of the transaction in which he was acting. ATGF was ignorant of the circumstances surrounding the transaction. Because Horsley's knowledge of the fraudulent nature of the transaction was integrally related to his duties for White and Millennia, that knowledge is imputed to White and

Millennia Because Horsley's duties to Granite Title and to Granite Title on behalf of ATGF had no connection with the subject matter to which his knowledge related, his knowledge of the fraudulent nature of the transaction is not imputed to ATGF

12 For the foregoing reasons, Millennia's Motion for Partial Summary Judgment be and it is hereby denied

B. ATGF's Motion for Partial Summary Judgment ATGF moved for partial summary judgment upon the grounds (i) that Section 31A-23-308 violates constitutional equal protection requirements, (ii) that statute violates constitutional due process requirements, and (iii) if that statute is enforceable and applies here, then the jury must apportion damages by comparing the relative fault of appropriate parties under Utah Code Ann §78-27-38

1 There exist no genuine issues of material fact bearing upon ATGF's Motion for Summary Judgment

2 Utah Code Ann §31A-23-308 violates Article I, Section 24 of the Utah Constitution (which requires that "[a]ll laws of a general nature shall have uniform operation") because it treats title insurers differently than other similarly situated entities without a reasonable basis Title insurance agents both handle escrow closings and issue title insurance on behalf of title companies (which are the actual insurers) In addition to title insurance agents, escrow companies, lawyers, banks, mortgage brokers, and real estate agents handle funds in connection with real estate closings and escrows, but only closings handled by title insurance agents subject title companies to liability There is no rational basis upon which strict liability can be imposed on title companies but not on other similarly situated principals Although parties may place funds in escrow with entities other than title insurance agents, the statute

singles out title companies as the only entity that may be held strictly liable for the mishandling of such funds and only subjects them to liability as to closings handled by title insurance companies.

3. Utah Code Ann. §31A-23-308 violates the due process clause of the Utah Constitution, Article I, Section 7 because the statute imposes liability on someone other than the party at fault (here, the title company) which had no knowledge of and could not be expected to have prevented the actionable conduct. To construe §31A-23-308 in a constitutionally permissible manner requires that the statute be read to require that the title company have some knowledge and/or control over the fraudulent acts of the title insurance agent before liability is imposed. Thus, the statute must be read to require that the title company issue or distribute a commitment, accept an order for title insurance, or otherwise participate in the transaction before being held liable. Because the undisputed facts establish that ATGF had no knowledge of the transaction and did not issue or distribute a commitment or accept an order for title insurance, the statute, construed constitutionally, does not subject ATGF to liability.

4. Because of the other rulings of the Court, the Court does not address ATGF's argument that liability under Section 31A-23-308 must be allocated in accordance with Utah's comparative fault statute.

5. The Motion for Partial Summary Judgment of ATGF be and the same is hereby granted

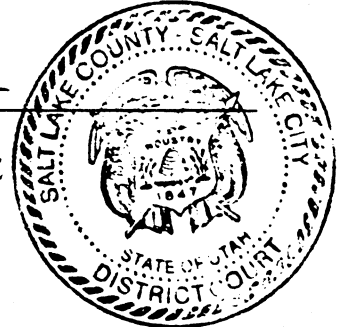
6. The First Cause of Action of the Complaint herein of Millennia be and the same is hereby dismissed with prejudice and upon its merits. This Order does not address whether or not its various rulings affect the other causes of action contained in the Complaint.

C. Miscellaneous. The Court defers its decision on an award of costs until the Court enters a final Order disposing of all of the claims of all of the parties in this action.

MADE AND ENTERED this 16th day of Apr., 2001.

BY THE COURT:


J. DENNIS FREDERICK
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT** was served by hand delivering a copy this 21st day of March, 2001, addressed to:

Thomas R. Karrenberg, Esq.
Nathan B. Wilcox, Esq.
ANDERSON & KARRENBERG
Attorneys for Plaintiff
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

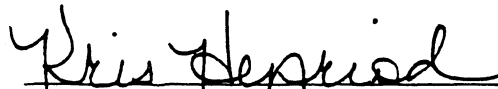
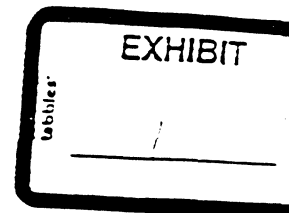

Kris Henriod, Secretary

EXHIBIT 1

SS:



SCHEDULE A

File Number 99-1071A-2493

1. Effective Date: April 12, 1999 AT 8:00 AM

2. Policy or policies to be issued:		Amount	Premium
(A)	ALTA Owner's Policy	\$	\$
	Proposed Insured:		
(B)	ALTA Loan Policy	\$TBD	\$TBD
	Proposed Insured:		
	TBD		
	Additional Charges (if any)	End.	

TOTAL

\$

3. The estate or interest in the land described or referred to in this commitment and covered herein is fee simple and title thereto is at the effective date hereof vested in:

C.M.K. & ASSOCIATES

C. Merrill KENT

4. The land referred to in this commitment is located in Summit County, State of Utah and is described as follows:

ALL OF LOT 1, ECKER HILL PLAT "D" SUBDIVISION, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF RECORD IN THE SUMMIT COUNTY RECORDER'S OFFICE.

Countersigned at Salt Lake City, Utah


Authorized Officer or Agent
Member's Number: 1071A

American Land Title Association Commitment-Utah
Form No. CU-A

EXHIBIT "1"

File No. 99-1071A-2493

SCHEDULE B-Section 1
Requirements

The following are the requirements to be complied with:

Item (a) Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.

Item (b) Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record.

Item (c) Payment of all taxes, charges and assessments, levied and assessed against the subject premises which are due and payable.

Item (d) Pay us the premiums, fees and charges for the policy. In the event, the transaction, for which this commitment is furnished, cancels, the minimum cancellation fee will be \$200.00.

Item (e) You must tell us in writing the name of anyone not referred to in this commitment who will get an interest in the land or who will make a loan on the land. We may then make additional requirements or exceptions.

Item (f) If the applicant desires copies of any matters shown as exceptions in Schedule B - Section 2, the Company will furnish such upon request at no charge or a minimal charge as the case may be.

NOTE: The property address is: 7088 PINECREST DRIVE
PARK CITY, UTAH 84098

American Land Title Association Commitment-Utah
Schedule B-Section 1
Form CU-B
Valid Only if Schedule B and Cover Are Attached.

SCHEDULE B-Section 2

Exceptions

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

1. Rights or claims of parties in possession not shown by the public records.
2. Easements, or claims of easements, not shown by the public records.
3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, and any facts which a correct survey and inspection of the premises would disclose and which are not shown by the public records.
4. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
6. Taxes for the year 1999 are accruing as a lien not yet due and payable. Taxes for the year 1998 have been paid in the amount of \$2,956.68.00. Tax Serial No. EKH-D-1.
7. Said property is within the boundaries of Park City, and is subject to any charges and assessments levied thereunder. No outstanding charges were found.
8. Master Declaration of Covenants, Conditions and Restrictions of PineBrook, A Master Planned Development, Summit County, Utah, dated March 25, 1991 and recorded March 26, 1991, as Entry No. 338119, in Book 600, at Page 373-424 records of the Summit County Recorder.
9. Supplementary Declaration of Covenants, Conditions and Restrictions for ECKER HILL PLATS C&D, Summit County, dated April 27, 1995 and recorded April 28, 1995, as Entry No. 00428847, in Book 00880, at Page 00284-00289 records of the Summit County Recorder,
10. Power and Utility easement(s) for Lot 1 Ecker Hill Plat "D" are/is as follows:
A Seven (7) foot easement running along the Front Lot Line of subject property
A Ten (10) foot easement running along Both the Side Lot Lines and the Back Lot Line of subject property.
11. Summit County Ordinance No. 320, an ordinance annexing Ecker Hill Subdivision Plats C&D into Summit County Service area No. 6 and Providing for an effective date upon publication, recorded November 04, 1997 as Entry No. 00491600, in Book 01091, at Page 00020-00021 records of the Summit County Recorder.

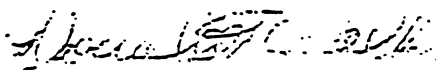
NOTE: The following names have been checked for judgments:

C.M.K. & ASSOCIATES

No unsatisfied judgments appear of record in the last eight years except as shown herein.

NOTE: UPON COMPLIANCE WITH UNDERWRITING REQUIREMENTS, EXCEPTION(S) 1-5 WILL BE OMITTED FROM THE LOAN POLICY TO BE ISSUED HEREUNDER.

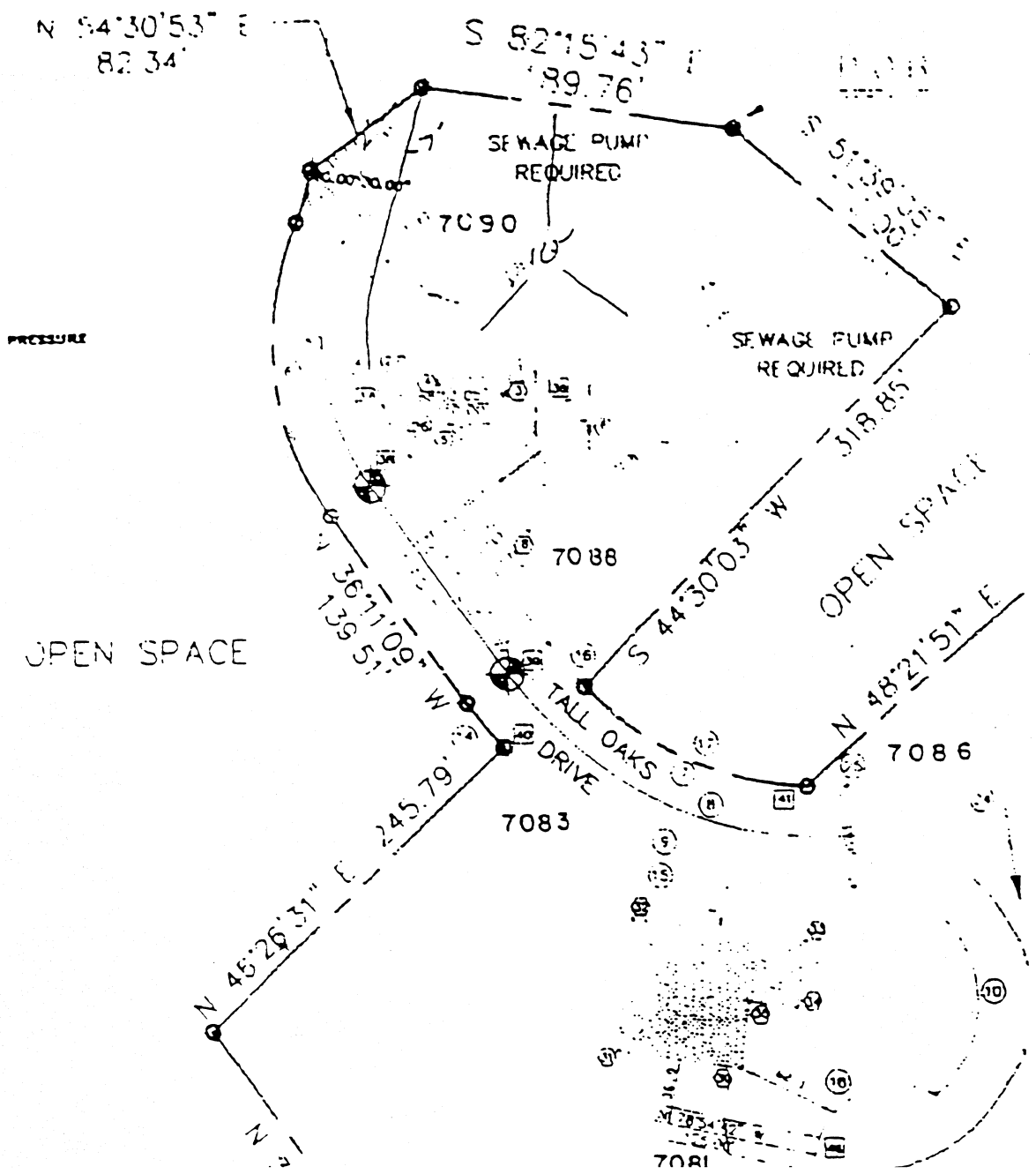
The Owner's Policy of title insurance committed for in this Commitment, if any, shall contain, in addition to the Items set forth in Schedule B-Section 2, the following items: (1) The Deed of Trust, if any, required under Schedule B-Section 1, Item (b). (2) Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof, water rights, claims or title to water, minerals, oil and gas; (3) Any and all unpaid taxes, assessments and unredeemed tax sales.

Countersigned: 
Authorized Officer or Agent
Member's Number: 1071A

American Land Title Association Commitment-Utah
Schedule B-Section 2
Form No. CU-B

Please make any inquiries for Title questions to DON WALKER, or for Escrow questions RAY HORSLEY,
Phone No. 944-1308.

7' Front
F.U.E
10' Side + Back
P.U.E



Tab 2

Bruce A. Maak, Of Counsel (2033)
Paul C. Drecksell (5946)
Diana Hagen (8205)
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Facsimile: (801) 532-7750

DM

Attorneys for Attorneys Title Guaranty Fund

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MILLENNIA INVESTMENT
CORPORATION, a Utah corporation,

Plaintiff,

vs.

ATTORNEYS' TITLE GUARANTY
FUND, INC., a Colorado corporation, and
GRANITE TITLE AND INSURANCE
AGENCY, INC., a Utah corporation;

Defendants.

**MEMORANDUM IN SUPPORT
OF ATGF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

Civil No. 000902574

Judge J. Dennis Frederick

Attorneys Title Guaranty Fund, Inc. ("ATGF") hereby submits this memorandum in support of its Motion for Partial Summary Judgment. This Memorandum is supported by the following deposition testimony and affidavits which are attached: Affidavit of Raymond Horsley ("Horsley Aff."); Affidavit of Brian Coleman ("Coleman Aff."); Affidavit of Donald T. Walker

insurer knowledge of the subject transaction and some control over the acts of the agent.

If this Court does not find section 31A-23-308 unconstitutional or inapplicable on the bases described above, ATGF is entitled to partial summary judgment in the form of the following determination by this Court: if ATGF is held liable under Utah Code Ann. § 31A-23-308, the jury must apportion damages by comparing the relative fault of any other person or entity at fault for the alleged injury under Utah's Comparative Fault Statute, Utah Code Ann. § 78-27-38. The Utah Supreme Court has long recognized that even strict liability is subject to comparative fault principles, and it is critical that this Court render such a determination now to aid the parties in completing discovery and preparing for the trial of this matter.

MATERIAL UNDISPUTED FACTS

1. Neither Mr. Horsley nor anyone else ever had any communication with anyone at ATGF about a commitment or binder for or policy or contract of title insurance for Millennia, White Property, or anyone else in connection with the Transaction. Nor did Horsley or anyone else ever provide any information to anyone at ATGF about Millennia, White Property, CMK or the Transaction, and ATGF did not know of Horsley's involvement and dealings with Millennia and White Property or about the Transaction. [Horsley Aff. ¶ 7; Coleman Aff. ¶ 9; Walker Aff. ¶¶ 4-6.]

2. ATGF never was asked by Horsley or anyone else to issue or distribute a

preliminary report of title insurance relating to the Transaction, or to issue a policy of title insurance naming White Property as an insured on such a policy. [Coleman Aff. ¶ 9; Walker Aff. ¶¶ 4-5.]

3. Escrow closings of real estate transactions in Utah can be, and are, handled by parties other than title insurance agencies including lenders, mortgage brokers, real estate brokerages, and licensed escrow companies. Each of these parties can receive and disburse funds for parties to a real estate transaction, but none of these parties issues title insurance commitments or policies. When these parties handle escrow closings and title insurance is desired, the title insurance is secured from a title insurer or title insurance agency that does not perform the escrow closing function. It is not at all uncommon for the escrow function of receiving and disbursing funds to be handled by a company completely separate from the company issuing title insurance. [Heiner Aff. ¶ 15.]

Respectfully submitted this 17Th day of October, 2000.

PARR, WADDOUPS, BROWN, GEE & LOVELESS

A handwritten signature in cursive script, reading "Paul C. Drecksell", written in black ink on a white background.

Bruce A. Maak, Of Counsel

Paul C. Drecksell

Diana Hagen

Attorneys for Attorneys Title Guaranty Fund, Inc.

Tab 3

Attorneys for Attorneys Title Guaranty Fund, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MILLENNIA INVESTMENT
CORPORATION, a Utah corporation,

Plaintiff,

VS.

ATTORNEYS' TITLE GUARANTY
FUND, INC., a Colorado corporation, and
GRANITE TITLE AND INSURANCE
AGENCY, INC., a Utah corporation;

Defendants.

**AFFIDAVIT OF
BLAKE T. HEINER**

Civil No. 000902574

Judge J. Dennis Frederick

STATE OF UTAH

)

: SS.

COUNTY OF SALT LAKE

)

Blake T. Heiner, being first duly sworn, deposes and states as follows:

1. I am a resident of the State of Utah, of adult age, and I have personal knowledge of all matters stated herein. If called as a witness at trial, I would testify as set forth in this Affidavit.

This case is the first and only time that I have ever heard of a title insurer, title agency, or an employee of either performing such functions on a transaction closed by the same party.

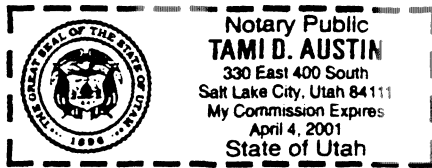
14. No prudent title insurance underwriter would allow an employee of a title agency to receive personal compensation from one party to a closing handled by that agency because, among other things, (i) an employee's doing so entails a conflict of interest which is unethical and could give rise to claims and suits, and (ii) an employee's doing so could influence the employee to not exercise fair, impartial judgment in closing the transaction and determining the form of the title insurance commitment or policy. A prudent title insurance underwriter who became aware of a title agency's employee's receipt of such personal compensation would immediately take steps to prevent that title agency from issuing the underwriter's policies under such circumstances.

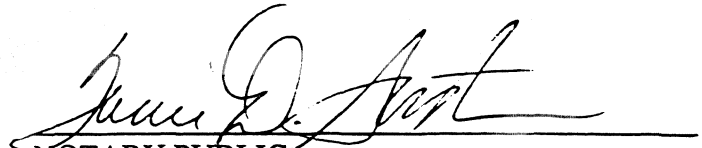
15. Escrow closings of real estate transactions in Utah can be, and are, handled by parties other than title insurance agencies including lenders, mortgage brokers, real estate brokerages, and licensed escrow companies. Each of these parties can receive and disburse funds for parties to a real estate transaction, but none of these parties issues title insurance commitments or policies. When these parties handle escrow closings and title insurance is desired, the title insurance is secured from a title insurer or title insurance agency that does not perform the escrow closing function. It is not at all uncommon for the escrow function of receiving and disbursing funds to be handled by a company completely separate from the company issuing title insurance.

DATED this 16th day of October, 2000.


Blake T. Heiner

SUBSCRIBED AND SWORN TO before me this 16th day of October, 2000.




NOTARY PUBLIC
Residing In Salt Lake City, Utah

My Commission Expires: 04.04.01

Tab 4

Citation
NAIC 230-1

Search Result

Rank 2 of 13

Database
NAIC-MODLRG

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (N.A.I.C.)
MODEL LAWS, REGULATIONS AND GUIDELINES
AGENTS/BROKERS/PROCEDURES
TITLE INSURANCE AGENT MODEL ACT
Current through April 2001

Drafting Note: This model Act should be adopted concurrently with the Title Insurers Model Act because the Acts contain many complementary provisions and both Acts are required to provide sufficient regulation of title insurance.

Table of Contents

- . Title and Purpose
- . Definitions
- . Licensing Requirements
- . Examination of Title Insurance Agents
- . Prohibition of Rebate and Fee Splitting
- . Controlled Business Provisions
- . Favored Agent of Title Insurer
- . Required Provisions of Underwriting Contract with Title Insurer
- . Policyholder Treatment
- 0. Conditions for Providing Escrow, Closing, or Settlement Services, and Maintaining Escrow and Security Deposit Accounts
- 1. Record Retention Requirements
- 2. Application of Other Insurance Code Sections to Title Insurance Agents
- 3. Rules and Regulations
- 4. Penalties and Liabilities
- 5. Violations of the Real Estate Settlement Procedures Act (RESPA)
- 6. Severability
- 7. Effective Date

. Title and Purpose

A. This Act shall be known and may be cited as the [insert state] Title Insurance Agent Act.

B. The purpose of this Act is to provide the state of [insert state] with a comprehensive body of law for the effective regulation and supervision of title insurance agents.

. Definitions

As used in this Act, unless the context otherwise requires:

A. "Abstract of title" or "abstract" means a written history, synopsis or summary of the recorded instruments affecting the title to real property.

B. "Associate" means any:

(1) Business organized for profit in which a producer of title business is a director, officer, partner, employee or an owner of a financial interest;

IAIC 230-1

having regulatory authority over banks and trust companies;

(3) Insured by the appropriate federal entity; and

(4) Qualified under any additional rules established by the commissioner.

M. "Referral" means the directing or the exercising of any power or influence over the direction of title insurance business, whether or not the consent or approval of any other person is sought or obtained with respect to the referral.

N. "Security" or "security deposit" means funds or other property received by the title insurance agent as collateral to secure an indemnitor's obligation under an indemnity agreement pursuant to which a title insurer is granted a perfected security interest in the collateral in exchange for agreeing to provide coverage in a title insurance policy for a specific title exception to coverage.

O. "Title insurance agent" or "agent" means an authorized person, other than bona fide employee of the title insurer who, on behalf of the title insurer, performs the following acts, in conjunction with the issuance of a title insurance report or policy:

(1) Determines insurability and issues title insurance reports or policies, or both, based upon the performance or review of a search, or an abstract of title; and

(2) Performs one or more of the following functions:

(a) Collects or disburses premiums, escrow or security deposits or other funds;

(b) Handles escrow, settlements or closings;

(c) Solicits or negotiates title insurance business; or

(d) Records closing documents.

P. "Title insurance business" or "business of title insurance" means:

(1) Issuing as insurer or offering to issue as insurer a title insurance policy;

(2) Transacting or proposing to transact by a title insurance agent any of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of a title insurance policy:

(a) Soliciting or negotiating the issuance of a title insurance policy;

(b) Guaranteeing, warranting or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases and for all liens or charges affecting the same;

(c) Handling of escrow, settlements or closings;

(d) Executing title insurance policies;

(e) Effecting contracts of reinsurance; or

(f) Abstracting, searching or examining titles;

(3) Guaranteeing, warranting or insuring searches or examinations of title to real property or any interest in real property;

(4) Guaranteeing or warranting the status of title as to ownership of or liens on real property and personal property by any person other than the principals to the transaction; or

(5) Doing or proposing to do any business substantially equivalent to any of the activities listed in this subsection in a manner designed to evade the provisions of this Act.

Tab 5

AGENCY AGREEMENT

Please evidence your assent as agent ("Agent") to the terms set forth below by signing and returning a copy of this agreement to Attorneys' Title Guaranty Fund, Inc. ("ATGF"):

1. ATGF hereby designates and appoints Agent as a member of ATGF for a period of one year from the date hereof and thereafter for successive one year periods, until this agreement is terminated as hereinafter provided.
2. In all acts pursuant to this agreement, Agent agrees to be bound by the Articles of Incorporation and the By-Laws of ATGF as they may be amended from time to time, and Agent agrees to comply with all rules, regulations, and instructions of ATGF.
3. ATGF will supply Agent with all materials necessary for the issuance of title insurance products, and Agent will use only those forms that are supplied by ATGF for such purpose.
4. Agent shall comply with authorizations of law respecting title insurance agents and shall not perform any acts pursuant to this agreement without a current, valid, title insurance license from the Utah State Department of Insurance authorizing Agent to act as an ATGF insurance agent.
5. The premiums collected, fees for title products, and forms are held in trust by the Agent for the benefit of ATGF.
6. Agent agrees to permit representatives of ATGF to audit and examine files, policies and premium income records (including, but not limited to, escrow and/or trust bank account statements) of Agent upon the request of, and reasonable notice by, ATGF.
7. Agent shall allow ATGF to conduct a credit investigation of Agent at anytime during the term of this Agreement.
8. Agent shall earn 70% of the gross premium and ATGF shall earn 30% of the gross premium when Agent:
 - A. Conducts a title search;
 - B. Performs an examination;
 - C. Prepares and issues all title products;
 - D. Conducts a closing;
 - E. Obtains and records documentation necessary to provide marketable title;
 - F. Issues a final title policy; and
 - G. Remits to ATGF 30% of the gross premium together with copies of the issued commitments and policies within 30 days of recording.

9. Either of the parties may terminate this Agency Agreement at any time by giving written notice to the other. Within five (5) business days from the date of termination of this Agreement by Agent or ATGF, Agent shall promptly return to ATGF all supplies, records, forms, and other property of any kind belonging to ATGF that are in Agent's possession, and Agent will account for and pay ATGF all amounts then owing to ATGF within 10 business days of written notice.

10. If Agent, or his or her firm, is subject to foreclosure or files for bankruptcy protection, Agent agrees that there is an automatic lien in favor of ATGF placed on premiums and escrow funds.

11. The undersigned certifies that everything in his or her ATGF Membership Application is true and correct to the best of his or her knowledge.

12. In any action arising out of this Agency Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs.

DATED this 2nd day of January, 1997.

Attorneys' Title Guaranty Fund, Inc.

By: [Signature]
It's: Vice President

Agent

Granite Title Insurance Agency

Print Name: Harlan Y. Hammond

[Signature: Harlan J. Hammond]

JUL 9 1995 9:51AM OPERATIONS

NO. 785 P. 4/4

AGENCY AGREEMENT

Please evidence your assent as Agent to the terms set forth below by signing and returning a copy of this agreement to Attorneys' Title Guaranty Fund, Inc. (Attorneys' Title)

1. Attorneys' Title hereby designates and appoints Agent as a member of Attorneys' Title for a period of two years from the date hereof and thereafter for two-year periods, until this agreement is terminated as hereinafter provided.
2. In all acts pursuant to this agreement, Agent agrees to be bound by the Articles of Incorporation and the bylaws of Attorneys' Title as they may be amended from time to time, and Agent agrees to comply with all rules, regulations, and instructions of Attorneys' Title.
3. Attorneys' Title will supply Agent with all materials necessary for the issuance of title insurance products, and Agent will use only those forms that are supplied by Attorneys' Title for such purpose.
4. Agent shall comply with authorizations of law regarding title insurance agents and shall not perform any acts pursuant to this agreement except while holding a valid license from the Department of Insurance of the appropriate state authorizing him/her to act as an Attorneys' Title Insurance Agent.
5. All forms, premiums, and fees for title products are held in trust by the Agent for the benefit of Attorneys' Title.
6. Agent agrees to permit representative(s) of Attorneys' Title to audit and examine files, policies and premium income records (including, but not limited to, escrow account bank statements) upon the request of Attorneys' Title.
7. Agent shall allow Attorneys' Title to conduct a credit investigation at anytime during the Agency relationship.
8. Agent shall earn 60% of the gross premium and Attorneys' Title shall earn 40% of the gross premium when Agent:
 - A. Orders a TSR (Title Search Report);
 - B. Performs an examination;
 - C. Obtains and records documentation necessary to provide marketable title;
 - D. Prepares and issues all title products;
 - E. Conducts or arranges closing;
 - F. Issues final title policy; and
 - G. Remits premium with commitments, policies and endorsements within 30 days of recording.
9. Upon termination, Agent shall return to Attorneys' Title all supplies, records, forms, money owed, etc. to Attorneys' Title within 30 days of written notice.
10. If the agent, or his/her firm, is subject to Foreclosure or files Bankruptcy, the agent agrees that there is an automatic lien placed on premiums and escrow funds.

The undersigned certifies that everything in this application is correct to the best of his/her knowledge.

Donald T. Walker
AGENT APPLICANT'S SIGNATURE

8/16/95
DATE

Donald T. Walker
PRINTED SIGNATURE

4/95

Manual
no license app
no software