

# Title Boot Camp

## The Closing Process

Jordan Dunn and Dan Lopez | April 17, 2019



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# Overview

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- Getting off on the Right Foot: Pre-closing
- The Closing Process: Drilling Down



# Getting off on the Right Foot: Pre-closing

# Overview

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- Planning ahead: Important steps at each phase of the transaction leading up to closing
  - Contract negotiation
  - Opening the title order
  - Opening escrow
  - Due diligence
- Practice Tips



# Contract Negotiation

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- Title and escrow-related topics in a typical commercial purchase and sale agreement...
  - Obvious ones:
    - “Good and marketable title”
    - Title and survey review
    - Purchaser’s closing condition: Title Policy
    - Seller covenant and / or condition to deliver title free of liens
    - Earnest money deposit; investment
    - Closing costs (taxes, adjustments, prorations)
    - Prepare and agree on settlement statement at closing
    - Post-closing holdback escrow
    - Escrow agent provisions



# Contract Negotiation (Cont.)

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- Title and escrow-related topics in a typical commercial purchase and sale agreement...
  - “Sleepers”:
    - Leases (reps, warranties, covenants, leasing costs)
    - Capital improvements and other work
    - Assigned contracts
    - Litigation
    - Covenants re: interim operations
    - Default and remedies



# Opening the Title Order

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- When to Order
- Prior title work / “starters”
- Property Description
  - Searchable vs. unsearchable legal descriptions
    - › Local indexing / search parameters
  - Correct and complete
  - Appurtenant parcels
  - Adjoining parcels owned by the seller
- Tax ID number / address
- Distribution list



# Opening the Escrow

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- Earnest money deposits
- Escrow agreement
- Interest-bearing accounts / W9





# Due Diligence

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- Title due diligence
  - Documents
    - › Title commitment
    - › Title Affidavit
    - › Survey
    - › Zoning information
    - › Leases
    - › PSA
    - › SNDAs
    - › Certificates of Satisfaction
    - › Third party estoppels
    - › Liens / utilities / violations search report
  - › Pro forma title policy



# Due Diligence (Cont.)

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## – Title due diligence (cont.)

- Extended coverage and endorsements – what coverage is involved? What are the risks that must be addressed?
  - › Mechanics liens
  - › Survey matters
  - › Ongoing litigation
  - › Compliance with “Covenants”
  - › ROFRs and options
  - › Non-imputation
- Owner’s policies vs. loan policies



# Practice Tips

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## — Contract Negotiation

- Consider title and escrow in drafting and negotiation
- Understand interconnections between title / escrow and the PSA (some are obvious, but some are not)
- Understand local law / customs
- Contact title with questions
- Name specific title company contact

## — Opening the title order

- Circle up with title to nail down legal description and ETA
- Acquire and provide back title if possible
- Advise of any unknowns or changes in information



# Practice Tips (Cont.)

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## — Opening the escrow

- Ask title for W9 if not provided with wire instructions
- Validate wire instructions by phone
- Get escrow agreement in place early
- Notify escrow agent at the outset regarding key parties for wire confirmations and disbursement instructions



# Practice Tips (Cont.)

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## — Due Diligence

- Communicate early and often
- Review title commitment as soon as possible for obvious problems and lead-time items
  - › Legal description
  - › Litigation, liens, and other requirements / exceptions that may require time, attention, and remediation beyond what the parties and the PSA contemplate for closing
- Be aware of lead-time items
  - › Survey
  - › Zoning
  - › Property-specific and jurisdiction-specific requirements
- Provide title comments and endorsement requests early
- Advise the title company of mortgage financing



# The Closing Process:

## Drilling Down

# Overview

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- Documents and Logistics
- Closing Instruction Letters
- Settlement Statements and Disbursement
- Recording



# Documents and Logistics

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## – Components of the closing

- Escrow

- › Escrow agent receives, assembles, completes, holds, and disburses documents and funds, as instructed by the transaction's parties, in order to:
  - Facilitate and confirm deliveries required for closing (pursuant to a PSA, a loan commitment, or otherwise), as defined by the parties
  - Issue title coverage that may be required as a condition to closing, and satisfy the title company's underwriting and other requirements for issuance of such title coverage
  - Comply, or facilitate the parties' compliance, with governmental requirements applicable to the transaction





# Documents and Logistics

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- Components of the closing
  - Escrow (cont.)
    - › Typical closing documents:
      - Settlement Statement
      - Closing Instructions
      - Owner's Affidavit
      - Deed (if sale)
      - Mortgage / Deed of Trust (if financing)
      - 1099-S (if sale)
      - FIRPTA (if sale)
      - Resolution / Authority Documents



# Documents and Logistics (Cont.)

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## – Components of the closing

- Escrow (cont.)

- › Closing documents (cont.):

- Jurisdictional forms (e.g., state withholding forms, certifications relating to the value of the transferred property or the amount secured by a security instrument, for transfer / recordation tax purposes)
    - Other documents that the parties wish to make a part of the escrow, including PSA document, loan documents, third party agreements & invoices



# Practice Tips

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- Review the commitment carefully, and well in advance, for closing-related requirements
- Negotiate closing documents early, and use pre-negotiated / pre-approved forms if appropriate
- Prepare, distribute and discuss a checklist
- Clearly allocate responsibility for title requirements and document preparation
- Don't assume that a counterparty, or the title company, is taking care of something
- Communicate! Communicate! Communicate!  
...and don't be afraid to ask questions



# Closing Instruction Letters

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## – Purpose

## – Nature of escrow agent's role

- Defined by contract (escrow instructions)
- Escrow instructions delegate execution, not discretion or decision-making
- In a multiparty escrow, the escrow agent is neutral and unbiased, by definition
- Escrow agent must be able to follow each party's instructions, as well as any applicable escrow agreements already in place, without conflict or inconsistency



# Closing Instruction Letters

## (Cont.)

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### – Components of the closing instruction letter

- Identify the parties and the transaction
  - › Identify parties authorized to give further instruction (go / no-go)
- Identify the deliveries that will be received from all parties
  - › Documents
  - › Funds
- Identify the conditions to performance by the instructing party
- Instructions for recording and post-closing delivery of documents



# Closing Instruction Letters

(Cont.)

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- Interaction between escrow instructions and other undertakings / documents:
  - Purchase / Sale Agreement and pre-existing escrow agreements (e.g., EMD escrow agreement)
  - Title commitment
  - Pro forma title policy
  - Settlement Statement
  - Other parties' instructions



# Closing Instruction Letters (Cont.)

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- Common problems - beware of
  - Inconsistencies & Conflicts
    - › Between escrow instructions and the commitment / pro forma
    - › Between escrow instructions and the title policy
    - › Between escrow instructions and other escrow instructions
    - › Between the process outlined in the letter and the closing process in fact
  - Obligations outside the scope of escrow agent's role
    - › To provide title coverage inconsistent with, or in addition to, the policy that will be issued
    - › To form a legal conclusion
    - › To verify facts not evidenced in the escrow itself, or not readily available to escrow agent and / or the title company
  - Introducing title coverage requests in a closing instruction letter



# Closing Instruction Letters (Cont.)

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## – Practice Tips

- Be careful in using form instruction letters
- Know the transaction
- Know the commitment and policy forms
- Avoid redundancy / inconsistency by having a final & approved pro forma
- Simplicity is generally a good thing

...Say what you need to say, but not more





# Settlement Statements and Disbursement

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- Purpose of Settlement Statement and Role of Escrow Agent
- Items Included:
  - Consideration
  - Deposits in escrow
    - › Earnest Money
    - › 1031 / QI funds
    - › Equity contributions
  - Loan proceeds and Loan Charges
  - Broker Fees



# Settlement Statements and Disbursement (Cont.)

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## – Items Included (Cont.):

- Title and escrow charges
  - › Closing fee
  - › Search & exam fees
  - › Policy and endorsement premiums
  - › Transfer and recordation taxes
  - › Recording fees
- Prorations and adjustments
  - › Property-level adjustments (e.g., rent, security deposits, CAM, operating expenses)
  - › PSA Adjustments
  - › Real property taxes



# Settlement Statements and Disbursement (Cont.)

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- Items Included (Cont.):
  - Disbursements
    - › Sale proceeds
    - › Loan payoffs
    - › Third party payments
    - › Real property tax payments
    - › Post-closing escrows



# Settlement Statements and Disbursement (Cont.)

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## – More on Tax Prorations

- Contractual, like any other proration
- Separate and distinct from tax assessment and collection
- Reasonable minds can differ on how to do real property tax prorations... with drastically different results
- Important to understand the jurisdiction's custom and practice,
  - › Variations from jurisdictional custom / practice
  - › Clarity is critical
- Calculation in general



# Settlement Statements and Disbursement (Cont.)

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- WE'RE CLOSED! What triggers closing?
  - Funds received
  - Documents received
  - Approvals received
  - Title company prepared to act in accordance with Escrow Instructions



# Settlement Statements and Disbursement (Cont.)

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## — WIRE FRAUD

- Red Flags
  - › Wiring instructions change last minute
  - › Suspicious email account
  - › Asked to wire to foreign account
  - › Urgency
  - › Account name does not match payee
- ALTA Practices
  - › Call, don't email
  - › Be suspicious
  - › Confirm it all
  - › Verify immediately
  - › Forward, don't reply



# Recording



- Although it is generally not necessary to effect a conveyance as between the grantor / grantee, recording is often necessary in order for a conveyance to be enforceable against, or to establish priority with respect to the interest of, a party other than the grantor / grantee
- Because title insurance addresses, among other things, the status of the insured title vis-à-vis certain third party interests, recording is fundamental to title insurance

# Recording (Cont.)

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- Challenges and jurisdiction-specific concerns
  - Proper conveyancing language
  - Notarial acts / proper forms of acknowledgment
    - › In-state vs. out-of-state acknowledgments
  - Authority evidence (and jurisdictional requirements)
  - Title chain problems
  - Local review of recordation / transfer tax calculations, or basis for exemption
  - Document formatting
  - Unauthorized practice of law
  - Tax parcel identification
  - Registered land
  - Recent changes in legal description





# Recording (Cont.)

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## – Recording logistics

- E-recording vs. counter recording
- Special situations where timing of recording is important (e.g., HUD closings)

## – Recording Practice Tips

- Contact title company early to discuss forms / review proposed documents for recordability
- Review title requirements for recording-related items and defects in the title chain
- Understand the recordation / transfer tax landscape
  - › If an exemption applies, discuss with the title company early
  - › Leasehold conveyances (...can be tricky in a lot of jurisdictions)

# Questions?

- Jordan Dunn
- [jdunn@firstam.com](mailto:jdunn@firstam.com)

Dan Lopez  
[danlopez@firstam.com](mailto:danlopez@firstam.com)



# Session 4 Surveys & How to Review

Wednesday, May 15

11 am Pacific / 2 pm Eastern Time

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