Rhode Island Supreme Court Sets Standards for Non-Attorneys Conducting Closings

The Rhode Island Supreme Court recently found that non-attorney title insurance companies and their agents are able to conduct closings in the state without violating unauthorized practice of law provisions. The decision in *In re* William E. Paplauskas, Jr.; *In re* Daniel S. Balkun and Balkun Title & Closing, Inc.; and *In re* SouthCoast Title and Escrow, Inc. comes after the Unauthorized Practice of Law Committee referred these three cases to the Supreme Court upon a finding that a real estate closing, and some related processes, are the practice of law requiring the involvement of an attorney. The Committee recommended that the Court find the following activities constitute the practice of law, necessitating the involvement of an attorney:

1. Conducting a real estate closing;
2. Examining a title for marketability;
3. Drafting a deed;
4. Drafting a residency affidavit; and
5. Drafting a durable power of attorney.

The Court permitted parties to submit amicus briefs that address whether the Committee's recommendation should be upheld by the Court. Connecticut Attorneys Title Insurance Company (CATIC) was among the parties, and notably the only title insurance underwriter, to submit an amicus urging the Court to adopt the Committee's recommendations. CATIC argued that "[t]he process of conveyancing encompasses a number of sophisticated functions that require an attorney to adequately protect the interests of the parties to a real estate transaction." Brief for Connecticut Attorneys Title Insurance Company as Amicus Curiae, p. 14, *In re* Daniel S. Balkun and Balkun Title & Closing, Inc. (UPLC-2017-1, June 7, 2018).

In its decision, the Court acknowledged the risks of a real estate transaction and stated that forgoing the use of an attorney in a real estate transaction is "a course of action … fraught with peril." Opinion at 1. Nevertheless, the Court adopted the Committee's recommendations in part and rejected them in part, holding that certain actions in the real estate transaction are more ministerial and can be conducted by non-attorney title companies and their agents without violating unauthorized practice of law provisions. Specifically, a non-attorney title insurance agent can conduct a real estate closing, draft a residency affidavit, and draft a durable power of attorney if such is limited to the closing, when such services are done in conjunction with the issuance of title insurance. In rendering its decision, the Court imposed a number of restrictions and requirements on these non-attorney title insurance agents.

Defining the practice of law

The Rhode Island Supreme Court has "the ultimate and exclusive authority to determine what does and does not constitute the practice of law within the state." *In re Town of Little Compton*, 37 A.3d 85, 88 (R.I. 2012). In rendering its decision, the Court drew upon case law, statutory authority, and established practices to determine what activities require the involvement of an attorney.

While the Court found that the practice of law includes conveyancing,[1] such a finding was not deemed sufficient to address the questions posed by the Unauthorized Practice of Law Committee given that "conveyancing is not a unitary, indivisible activity that constitutes the practice of law, but rather carries many discrete services and activities that do not qualify as the practice of law." Opinion at 27 quoting *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 946 N.E.2d 665, 675 (Mass. 2011) (internal quotes omitted). In addition, the Rhode Island Title Insurers Act explicitly gives title insurance agents the authority to perform various real estate services, including the handling of real estate closings. R.I. Gen. Laws Ann. § 27-2.6-3(17).

What triggers the need for an attorney?

Conducting a closing

The Court looked at the custom and practice of conducting a closing in both Rhode Island and other jurisdictions and weighed policy considerations for requiring an attorney to conduct the closing. The Court found that Rhode Island has a long history of allowing non-attorney title companies and their agents to conduct closings and there has been a "paucity of consumer complaints" that would lead the Court to alter this practice. Opinion at 25. The Court also found that closings conducted by attorneys would be most costly to consumers and reduce consumer choice. In addition, the Court had concerns about the ability of an attorney to effectively provide representation to multiple parties to a real estate transaction.

<u>Ultimately, the Court held that non-attorney title insurance agents may conduct real estate closings, with the following restrictions and requirements:</u>

1. At the outset of the closing, non-attorney title agents must clearly disclose that they are not attorneys and that they do not represent the buyer or the seller, nor can they provide legal advice. If legal advice is required, the parties should suspend the closing and seek counsel from an attorney.
2. Most notably, the Court also required non-attorney title agents to provide a written, independent notice to the buyer and seller stipulating the agent's limited role in the transaction. The agent must orally explain the notice to the

[1] *See RI Bar Ass'n v. Automobile Service Ass'n*, 179 A. 139, 144-145 (R.I., 1935)

buyer and seller and direct them to read the document. The notice must be the first document presented and signed during the closing.

3. The buyer and the seller must sign a copy of the notice to acknowledge that the title agent provided warnings about the agent's limited role in the transaction and that the parties understood such warnings.
4. The title agent must also sign the notice to attest that he/she provided and explained the notice to the parties.
5. The agent is required to retain the notice and provide a copy to both the buyer and the seller following the transaction.

Generally, agents must limit their role to identifying the documents, instructing the parties where to sign, and delivering executed copies of the documents. The Court warned that "conducting a closing will constitute the practice of law if it involves the imparting of legal advice; involves representation, counsel, or advocacy on behalf of another; or involves the rights, duties, obligations, liabilities, or business relations of another." Opinion at 28. Should the parties to the real estate transaction have any questions about the legal implications of any aspect of the closing, the title agent must direct the parties to contact an attorney for assistance.

Examining title

In determining whether the process of examining title should be considered the practice of law, the Court looked at the legal implications of a determination of title and found that the public interest was best protected when examining title was limited to attorneys. The Court clarified that "it is permissible for title insurance companies and their agents to conduct title examinations without engaging in the unauthorized practice of law *only if* an attorney engaged or employed by the title insurance company conducts the title examination." Opinion at 30 (emphasis added). The Court noted that the UPL Committee had made a prior determination that conducting a title search did not constitute the practice of law.

Drafting documents

The Court also considered whether drafting a deed, a residency affidavit, and a durable power of attorney constitutes the practice of law. The Court held that drafting a deed does require the involvement of an attorney because of the significant legal implications of the document. The Court found that a deed that misstates the parties' tenancy or fails to incorporate an accurate property description has the potential for "serious and lasting impact on the property rights of the buyers." Opinion at 33.

However, the Court found that a residency affidavit, which is a standardized form, can be completed by a non-attorney title agent, so long as the seller does not have any question about his or her residency. Such questions must be addressed by an attorney, who may be employed by the title insurance company. Similarly, drafting a

durable power of attorney was found to be a routine and administrative process and thus does not constitute the practice of law when such document is limited to a real estate closing. If the durable power of attorney is not so limited, it must be drafted by an attorney.

Key Takeaways

The Rhode Island Supreme Court provided some much-needed clarity regarding the involvement of non-attorney title insurance companies and their agents in the closing transaction. Though certain closing activities may not be considered the practice of law, it is imperative to note that the Court found that "the best and most prudent practice would be to retain counsel for guidance at every step of the transaction." Opinion at 29. Following this decision, it is critical for both attorneys and non-attorney title agents to consider their business practices and make appropriate adjustments to ensure that the transaction goes smoothly and that the parties understand their rights and obligations under the deal. Remember: when in doubt, reach out to your trusted Rhode Island attorney for legal advice and guidance.

Stay tuned for more news on this case and what CATIC is doing to keep you in the game.