

**In the Supreme Court**  
**Appeal from the Michigan Court of Appeals**  
**Murphy, C.J., and Markey and Riordan, JJ.**

---

Bank of America, N.A.,

Plaintiff-Appellant

v.

First American Title Insurance Company; Patriot Title Agency, LLC; Kirk D. Schieb; Westminster Abstract Company doing business as Westminster Title Agency, Inc.; The Prime Financial Group, Inc.; Valentino M. Trabucchi; Pamela S. Notturmo, formerly known as Pamela S. Siira; Douglas K. Smith; Joshua J. Griggs; Nathan B. Hogan; State Value Appraisals LLC, and Christine D. Mays,

Defendants-Appellees,

and

Fred Matson, Michael Lynett, Jo Kay James, and Paul Smith,

Third-party Defendants.

Supreme Court No.: 149599

Court of Appeals No.: 307756

Oakland CC No.: 2010-11206-CK

---

**PLAINTIFF-APPELLANT BANK OF AMERICA, N.A.'S REPLY TO WESTMINSTER  
TITLE AGENCY'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
RJ LANDAU PARTNERS PLLC  
Attorneys for Plaintiff-Appellant Bank  
of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, Michigan 48105  
(734) 865-1585  
rjlandau@rjpls.com  
cmerritt@rjpls.com

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

INDEX OF AUTHORITIES..... iii

I. The closing instructions and closing protection letters are separate legal contracts to be enforced according to their plain terms ..... 1

    A. The Bank properly pleaded a breach of contract claim against Westminster for failure to comply with the Bank’s closing instructions. .... 2

    B. Westminster was required to follow all of the Bank’s closing instructions regardless of the fact that the contracts do not state their purpose is to be an anti-fraud device. .... 4

    C. Westminster’s duties under the closing instructions were not limited to providing the Bank with a first mortgage or the narrow matters also covered by the CPLs. .... 5

II. There are genuine issues of material fact as to whether Westminster failed to comply with the Bank’s closing instructions..... 7

III. There are genuine issues of material fact as to whether Westminster closed the transactions with “fraud or dishonesty.” ..... 8

IV. *New Freedom’s* extension of the protections provided to mortgagors by MCL 600.3280 is not a correct rule of law, and should not be applied to the Bank’s claims..... 10

**INDEX OF AUTHORITIES**

**Cases**

*FDIC v Attorneys’ Title Insurance Fund, Inc.*, unpublished opinion of the United States District Court for the Southern District of Florida, issued September 3, 2014, (Docket No 12-23599). 9

*FDIC v St Louis Title, LLC*, unpublished opinion of the United States District Court for the Eastern District of Missouri, issued January 17, 2014 (Docket No 13-cv-1078) ..... 4

*FDIC v US Titles, Inc*, 939 F Supp 2d 30 (DDC 2013)..... 4, 5

*Formall, Inc v Community Nat’l Bank*, 166 Mich App 772; 421 NW2d 289 (1988)..... 3

*General Electric Credit Corp v Wolverine Ins Co*, 120 Mich App 227; 327 NW2d 449 (1982)... 8

*Goldman v Century Ins Co*, 354 Mich 528; 93 NW2d 240 (1958)..... 4, 5

*Holton v A+ Ins Assocs*, 255 Mich App 318; 661 NW2d 248 (2003)..... 2

*Iron County v Sundberg, Carolson & Assocs*, 222 Mich App 120; 564 NW2d 78 (1997). ..... 3

*McMillan v State Highway Comm*, 426 Mich 46; 393 NW2d 332 (1986). ..... 7

*Port Huron Ed Ass’n MEA/NEA v Port Huron Area School Dist*, 452 Mich 309; 550 NW2d 228 (1996). ..... 6

*Simonson v Michigan Life Ins Co*, 37 Mich App 79; 194 NW2d 446 (1971). ..... 4

*Slomka v Hamtramck Housing Comm’n*, unpublished opinion of the Court of Appeals of Michigan, issued October 9, 2012 (Docket No 298025)..... 5

*Stark v Kent Products, Inc*, 62 Mich App 546; 233 NW2d 643 (1975) ..... 5

*United States v Benchick*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 21, 2014 (Docket No 13-cr-20453)..... 2

**Statutes**

MCL 600.3280..... 10

**Rules**

MCR 2.11(B)(1)..... 3

MCR 2.116(G)(6). ..... 2

**Other Authorities**

*Black’s Law Dictionary* (Abridged 7th ed)..... 3

**I. The closing instructions and closing protection letters are separate legal contracts to be enforced according to their plain terms.**

Westminster readily admits that the Bank was defrauded by the four mortgage loan transactions at issue in this appeal. (Westminster Br at 1, 5-6, 10-11.) As closing agent—and gatekeeper—for two of these transactions (Enid and Heron Ridge),<sup>1</sup> Westminster was uniquely positioned to stop the frauds being perpetrated against the Bank. Instead, Westminster allowed the fraudulent transactions to be concluded, and the Bank suffered actual losses in excess of \$5 million as a result of the Westminster closings.<sup>2</sup> Westminster’s conduct in closing the fraudulent transactions is relevant under two separate enforceable contracts: (1) Westminster is directly liable pursuant to the Bank’s closing instructions and (2) Westminster is liable as an indemnitor of First American pursuant to the closing protection letters (CPLs) issued to the Bank.<sup>3</sup> Under the terms of the Bank’s closing instructions, Westminster agreed to be financially liable for any loss resulting from the failure to follow the Bank’s instructions. (294 JA, 302 JA.) Under the terms of the CPLs, First American separately agreed to reimburse the Bank for losses arising out of the “fraud or dishonesty” of Westminster in connection with the closings. (274-79 JA.)

Westminster acknowledges that the Bank never would have approved the Golf Ridge and Kirkway transactions for closing “if it had the slightest notion [Patriot Title] was ‘dirty.’” (See Westminster Br at 13.) By the same token, the Bank never would have approved the Enid and Heron Ridge transactions for closing if it had the slightest notion that Westminster would not

---

<sup>1</sup> The remaining transactions (Golf Ridge and Kirkway) were closed by Patriot Title.

<sup>2</sup> The Bank suffered an additional \$2.3 million in losses as a result of Patriot Title closings.

<sup>3</sup> Westminster is not a party to the CPLs, and the Bank has never argued that Westminster is directly liable under the CPLs. But because Westminster’s agency agreement with First American requires it to indemnify First American (Westminster Br at 5), First American has largely relied on Westminster to defend against the Bank’s CPL claims. Westminster’s brief, however, does not directly address the Bank’s CPL claims.

strictly comply with all the Bank’s closing instructions or would perform the closings dishonestly. Relying on hyperbole (and an unrelated settlement with the Department of Justice),<sup>4</sup> Westminster argues, however, that the Bank does not “deserve” to enforce its closing instructions and CPLs because the Bank was “an icon of American greed.” (*Id.* at 1.) Similar “blame the victim” defenses have been repeatedly rejected when raised in mortgage fraud cases, and the Bank’s contracts with Westminster and First American are judicially enforceable irrespective of Westminster’s expedient condemnation of the mortgage business.<sup>5</sup> See, e.g., *United States v Benchick*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 21, 2014, p \*3-8 (Docket No 13-cr-20453) (rejecting “blame-the-victim” defense to bank fraud based on allegedly lax lending practices).<sup>6</sup>

**A. The Bank properly pleaded a breach of contract claim against Westminster for failure to comply with the Bank’s closing instructions.**

The Bank’s complaint clearly alleges that the closing instructions signed by Westminster define the Bank’s contractual relationship with Westminster. (67 JA, ¶¶ 119 and 121; contra

---

<sup>4</sup> Westminster claims the Bank did not care whether Westminster followed all of the closing instructions, or properly closed the loans, because the Bank was only interested in bundling the mortgages as securities and selling them to investors. (Westminster Br at 1-2, 28.) Not only does this fabricated argument ignore Westminster’s acknowledgment that the Bank would never approve a “dirty” loan, but the subject loans were never bundled into securities or otherwise sold to investors (1647-1650 JA). Further, the Bank’s negotiated settlement with the Department of Justice (which primarily dealt with claims related to conduct that occurred at Countrywide and Merrill Lynch prior to the Bank’s acquisition of those entities) does not establish causation for the Bank’s losses on any loan. See *Holton v A+ Ins Assocs*, 255 Mich App 318, 326; 661 NW2d 248 (2003). As such, the Bank’s settlement of these unrelated claims are inadmissible under MRE 402, 403, and 404, and should not be considered in support of Westminster’s motion. MCR 2.116(G)(6).

<sup>5</sup> Westminster admonishes the Bank (and lenders in general) for processing too many mortgages. (Westminster Br at 1.) Westminster—who performed 30 closings a day during the period at issue (*id.* at 27), of course, profited on each mortgage loan closed (just as First American did).

<sup>6</sup> All unreported cases are attached as exhibit 12.

Westminster Br at 21.) Westminster argues, however, that the Bank's complaint did not provide *sufficient* factual allegations regarding Westminster's breach of the closing instructions. (Westminster Br at 23-24.) Westminster's critiques of the Bank's complaint,<sup>7</sup> however, are misplaced—and based on a misunderstanding of Michigan's pleading rules, the term “*inter alia*” as used in the Bank's complaint, and the Bank's interrogatory answers.

The Bank's complaint was only required to contain enough factual allegations to inform Westminster of the nature of the claims by the Bank. See MCR 2.11(B)(1) and *Iron County v Sundberg, Carolson & Assocs*, 222 Mich App 120, 124; 564 NW2d 78 (1997). Paragraphs 118 to 123 of the Bank's complaint plainly inform Westminster of the nature of the Bank's breach of contract claims against Westminster. Paragraph 122 of the Bank's complaint states that the closing instructions “required, *inter alia*, that the identity of all payees appear on the HUD-1.” (67 JA.) The term *inter alia* means “among other things” and clearly signifies that the closing instructions (which were incorporated into the complaint by paragraph 120)—include additional requirements. *Black's Law Dictionary* (Abridged 7th ed), p 651. Westminster was therefore informed that the Bank's claims against Westminster were not limited to the one closing instruction specifically enumerated in the complaint.<sup>8</sup> Further, all the theories advanced by the Bank in support of its breach of contract claim against Westminster clearly fall within the scope of its originally pleaded claim, see *Sundberg*, 222 Mich App at 124, as confirmed by the Bank's answers to interrogatories

---

<sup>7</sup> Westminster never moved for a more definite statement.

<sup>8</sup> Westminster suggests that the Bank's breach of contract claim is not sustainable under *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772; 421 NW2d 289 (1988). (Westminster Br at 16.) But the *Formall* case dealt with specific pleading requirements for tortious interference claims, and the case is not relevant to this appeal. See *id.* at 780.

from Westminster requesting greater factual specificity regarding the problems with the Westminster closings. (See, e.g., 784-792 JA and 819-820 JA).<sup>9</sup>

**B. Westminster was required to follow all of the Bank’s closing instructions regardless of the fact that the contracts do not state their purpose is to be an anti-fraud device.**

For each closing, Westminster certified compliance with all of the conditions outlined in the Bank’s closing instructions. (296 JA, 304 JA.) Westminster admits that it agreed to follow these instructions. (Westminster Br at 25.) But Westminster still “resists any claim” that the closing instructions constitute a contract. (*Id.* at 18.) Ignoring the mounting case law finding closing instructions to be enforceable contracts,<sup>10</sup> Westminster claims (for the first time)<sup>11</sup> the Bank’s closing instructions are not contracts because there was no meeting of the minds that the instructions were an “anti-fraud or fraud detection device.” (See *id.* at 18-19, 22-23.) This new argument misconstrues the concept of a “meeting of the minds.” See *Goldman v Century Ins Co*, 354 Mich 528, 535; 93 NW2d 240 (1958).

A “meeting of the minds” is only a figurative way of saying there must be mutual assent—which is judged by an objective standard, looking to the expressed words of the parties and their visible acts. *Id.* The express words of the closing instructions state that Westminster is required to comply with all of the closing instructions, and it is financially liable for any loss resulting from

---

<sup>9</sup> Westminster cites the Bank’s answer to interrogatory no. 34 as proof of the Bank’s “refusal” to describe the factual basis of its breach of contract claim. (Westminster Br at 24.) This interrogatory asks for the factual basis for paragraph 119 of the complaint. But this paragraph is self-explanatory, and there is simply no “factual basis” to reference.

<sup>10</sup> See Bank Br at 28-30, see also *FDIC v St Louis Title, LLC*, unpublished opinion of the United States District Court for the Eastern District of Missouri, issued January 17, 2014, p \*9 (Docket No 13-cv-1078) (“Closing instructions can give rise to a contractual agreement between a lender and a closing agent.”) and *FDIC v US Titles, Inc*, 939 F Supp 2d 30, 38 (DDC 2013) (“The Court declines to rule that closing instructions can never create a legal obligation in Virginia.”).

<sup>11</sup> Westminster claims its argument “refines” the Court of Appeals’ ruling (Westminster Br at 19).

its failure to follow the instructions. Westminster assented by signing the closing instructions. *Slomka v Hamtramck Housing Comm'n*, unpublished opinion of the Court of Appeals of Michigan, issued October 9, 2012, p \*11-12 (Docket No 298025) (“Signing an agreement ‘objectively manifests [an] intent to be bound.’”).

Regardless of whether Westminster realized the closing instructions could be used as an anti-fraud device, Westminster was required to comply with all the closing instructions.<sup>12</sup> See *Stark v Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975) (“One who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.”) The closing instructions did not state that Westminster was required to “police and stop . . . fraud” (Westminster Br at 25), but that is irrelevant as to the Bank’s claims under the closing instructions. Westminster agreed to comply with all of the Bank’s closing instructions, including those instructions designed as anti-fraud measures. See *US Titles*, 939 F Supp 2d at 38 (“Indeed, the reason the Closing Instructions required US Titles to alert the bank in such circumstances was to detect fraud.”).

**C. Westminster’s duties under the closing instructions were not limited to providing the Bank with a first mortgage or the narrow matters also covered by the CPLs.**

Westminster acknowledges that it agreed to follow the Bank’s closing instructions. (Westminster Br at 25), but then reverses course, claiming that it was not required to follow all of the closing instructions. According to Westminster, this is because its sole function was to provide the Bank with a first mortgage. Westminster points to the limited duties outlined in paragraph 1 of

---

<sup>12</sup> Likewise, Kawannah Clifton’s personal recollection that one of the purposes of the closing instructions was to ensure the Bank gets a first mortgage (Westminster Br at 18) is not relevant for purposes of mutual assent. See *Goldman*, 354 Mich at 535 (finding evidence of unexpressed thoughts and understanding inadmissible to establish intent).

the distinct CPL contracts as support for this odd theory. (*Id.* at 5, 19-20.) But Westminster provides no authority for its argument that the purpose of the closing instructions was merely to assist in the performance of so-called “well-known and notorious” duties (*id.* at 25),<sup>13</sup> and Westminster cannot unilaterally alter the express terms of the closing instructions by citing what it claims to be “well known” practice.<sup>14</sup> See *Port Huron Ed Ass’n MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 312; 550 NW2d 228 (1996).

Westminster’s agreement to follow all of the Bank’s closing instructions has nothing to do with First American’s separate liability under the CPLs, and Westminster’s post hoc justifications fail to support the Court of Appeals’ ruling that Westminster’s duties under the closing instructions are limited by the separate CPL contracts.<sup>15</sup> Westminster acknowledges that it was hired to do what the Bank’s closing instructions said. (*Id.*) But Westminster was hired to do everything the closing instructions said—not just those things that would trigger separate CPL liability or those things Westminster considered to be the “well-known” duties of a closing agent.<sup>16</sup>

---

<sup>13</sup> Westminster previously relied on *New Freedom* for this argument (1274 JA and 1277-78 JA), but abandoned the argument with the fate of *New Freedom* in doubt. (See Westminster Br at 2.)

<sup>14</sup> Westminster’s attempts to minimize the duties of a closing agent are directly contradicted by the standard of the industry, which considers a closing agent the “gatekeeper” of a mortgage loan transaction. (See Bank Br at 24-25.)

<sup>15</sup> Westminster admits that the Court may be “reluctant” to find the CPLs as the source of Westminster’s duties to the Bank. (Westminster Br at 25.)

<sup>16</sup> Westminster suggests that holding otherwise would require Westminster to evaluate the acceptability of the subject mortgage loans. (Westminster Br at 25). This is simply not true. Further, Westminster repeatedly claims that the Bank was negligent in not verify anything regarding the loans (*id.* at 6, 11, 19), but this is misleading, as the evidence clearly shows the borrowers’ assets and credit history were verified. (See, e.g., 496-97 JA.) Regardless, the fact that these loans were stated income loans is irrelevant as to the Bank’s breach of contract claims in this case. The Bank will further address this issue in its reply to First American’s brief on appeal.

**II. There are genuine issues of material fact as to whether Westminster failed to comply with the Bank's closing instructions.**

The Bank's unambiguous closing instructions required (1) all payees to be listed on the HUD-1; (2) the HUD-1 to be approved prior to closing; and (3) contributions from the sellers or third parties to be limited to those amounts authorized by the Bank in writing. (294-308 JA.) The Bank's closing instructions also conditioned the loans on there being no material variation in the facts submitted to the Bank. (*Id.*) When the evidence is considered in the light most favorable to the Bank (the non-moving party), it is clear that there are genuine issues of material fact as to whether Westminster complied with these closing instructions. The Bank should therefore be permitted to present the evidence of Westminster's specific violations of the closing instructions to the jury to determine if Westminster's breaches were a legal cause of the Bank's losses.<sup>17</sup> *McMillan v State Highway Comm*, 426 Mich 46, 63 n 8; 393 NW2d 332 (1986).

With respect to the Enid closing, Westminster states that "it appears" the revised HUD-1 was provided to the Bank on December 30, 2005. (Westminster Br. at 8.) But Westminster's brief cites to two *preliminary* versions of the HUD-1—not the substantially revised version printed on January 4, 2006 (906 JA). By failing to seek approval of the January 4, 2006 HUD-1 prior to closing, Westminster failed to comply with the Bank's closing instructions regarding HUD-1 approval and the listing of payees. Westminster further violated the closing instructions by changing material facts relating to the loan by distributing the proceeds in a manner inconsistent with the approved HUD-1.<sup>18</sup>

---

<sup>17</sup> Westminster itself argued to the circuit court that causation would be an "interesting question" for the jury. (155JA.)

<sup>18</sup> Westminster also failed to disclose the double escrow nature of this transaction to the Bank (another material variation in the facts submitted to the Bank). (Bank Br p 14; 957JA.)

With respect to the Heron Ridge closing, Westminster claims the closing instructions did not prohibit second mortgages (Westminster Br at 11-12), but the closing instructions plainly prohibit all third party contributions. Westminster's claim that the Bank had no reason to care about the undisclosed \$420,000 second mortgage is simply untrue. The second loan alone (even without considering the additional, undisclosed funds from the "dirty" closing agent, Patriot Title) pushed the Heron Ridge loan outside of the Bank's approved guidelines. (497 JA.) Westminster also had clear reason to know the borrower was buying the property as an investment and not for "Purchase" as set forth in the instructions (a material variation in the facts submitted to the Bank).<sup>19</sup>

**III. There are genuine issues of material fact as to whether Westminster closed the transactions with "fraud or dishonesty."**

A completely separate issue from Westminster's liability under the closings instructions is whether Westminster acted with "fraud or dishonesty" in closing the transactions, thereby triggering First American's liability under the CPLs.<sup>20</sup> Since neither Westminster nor First American has objected to the Court of Appeals' broad interpretation of the terms "fraud or dishonesty" as used in CPLs, the Court should apply this uncontested standard.<sup>21</sup>

As stated by Chief Judge Murphy in his dissent, the Bank:

submitted evidence regarding discrepancies in and/or problems with the HUD-1 settlement statements, along with evidence of unusual, unexpected, and questionable money sources utilized by transaction participants, interrelated or associated second transactions of a suspicious nature, and an illogical same day price fluctuation. From this evidence one could reasonably infer fraud or at least dishonesty on the part of Westminster.

---

<sup>19</sup> Westminster points to an Estoppel Certificate as proof Westminster had no reason to suspect the borrower was not going to live in the property (Westminster Br at 13), but the borrower's testimony shows that Westminster had good reason to know this representation was false.

<sup>20</sup> Whether Westminster is found to have acted with the requisite fraud or dishonesty is irrelevant as to the issue of whether Westminster failed to comply with the Bank's closing instructions.

<sup>21</sup> Cases dealing with the words "fraud" and "dishonesty" in fidelity bonds generally give the words broad meaning and extend to acts which show a "want of integrity" or "breach of trust." *General Electric Credit Corp v Wolverine Ins Co*, 120 Mich App 227, 234-235; 327 NW2d 449 (1982).

(38 JA.) Westminster's brief does not directly address the Bank's claim that Westminster acted with fraud and dishonesty as described by the CPLs. Westminster's defense, however, appears to be based primarily on the fact that Westminster did not receive any kickbacks from the closings (Westminster Br at 22) and Westminster closed the transactions "as usual" (*id.* at 27). But "fraud or dishonesty" does not require a kickback. See *General Electric Credit*, 120 Mich App at 235 ("It is not necessary that a party covered by a fidelity bond personally profit by his acts for coverage to attach."). And "business as usual" is simply not an excuse for failing to act honestly.

Recent case law from the Southern District of Florida aptly demonstrates the threshold needed to trigger CPL coverage based on a closing agent's "fraud or dishonesty." *FDIC v Attorneys' Title Insurance Fund, Inc.*, unpublished opinion of the United States District Court for the Southern District of Florida, issued September 3, 2014, (Docket No 12-23599). In *Attorneys' Title*, the court found that (1) failing to disclose secondary financing on the HUD-1 (*id.* at 33);<sup>22</sup> (2) preparing a HUD-1 that misrepresented the cash paid by the borrower at closing (*id.* at 36); (3) closing a transaction with a misrepresented purchase price (*id.* at 39); and (4) distributing payments not listed on the HUD-1 (*id.* at 44), all amounted to fraud or dishonesty under the CPLs. That threshold was plainly exceeded here where Westminster (1) failed to disclose secondary financing on the Heron Ridge transaction; (2) prepared HUD-1s that misrepresented the cash paid at closing for both transactions (undisclosed third party contributions for Heron Ridge and approved HUD-1 showed \$1.9 million payment made at closing for Enid); (3) concealed the purchase price for the

---

<sup>22</sup> The title insurer cited to *New Freedom* for the proposition that the HUD-1 is not the lender's document, but the court concluded that *New Freedom* failed to consider the relationship between the closing agent and the lender. *Id.* at 33.

double escrow Enid transaction;<sup>23</sup> and (4) distributed hundreds of thousands of dollars not listed on the approved HUD-1 for the Enid transaction. This is probative evidence from which a reasonable juror could conclude (as the court did in *Attorneys' Title*) that Westminster was “either actively participating [in] or...aware of but failed to disclose [the fraud].” (32 JA.)

**IV. *New Freedom's* extension of the protections provided to mortgagors by MCL 600.3280 is not a correct rule of law, and should not be applied to the Bank's claims.<sup>24</sup>**

Westminster only briefly addresses the full credit bid rule as announced in *New Freedom* to argue that principles of equity support an application of the rule to the Bank's claims. (Westminster Br at 29-31.) Westminster, however, acknowledges that the rule is based entirely on statute (citing MCL 600.3280 in full), and provides no justification for adopting a rule that requires a balancing of the “equity side of the ledger” rather than the bright line rule adopted by the legislature in MCL 600.3280—applying the rule only to mortgagors and those liable under the mortgage.<sup>25</sup>

Respectfully submitted,

**RJ LANDAU PARTNERS PLLC**

By: /s/Richard J. Landau  
Richard J. Landau (P42223)  
Attorneys for Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, MI 48105  
(734) 865-1585

April 14, 2014

---

<sup>23</sup> Westminster claims the Enid transaction was not a “traditional” double escrow (Westminster Br at 8), but the second page of the alert Westminster admits it was required to follow plainly refers to a scenario where the victim is the ultimate lender (like the Bank). (367 JA). Westminster also claims the Bank “learned of the double escrow” (Westminster Br at 8), but there is no evidence that Westminster disclosed the double escrow or the same day change in the purchase price to the Bank (let alone in writing as Westminster admits was required) (*id.* at 7).

<sup>24</sup> American Land Title Association has filed a motion seeking leave to file a late *amicus* brief regarding the full credit bid rule. It is telling that the “voice of the abstract and title-insurance industry” proposes to offer no opinions as to the other matters at issue in this appeal.

<sup>25</sup> This issue is further addressed in the Bank's reply to First American's brief on appeal.