

Escrow Holdbacks v. Underwriter Indemnities

WLTA Seminar

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Roadmap

- Escrow Holdbacks
 - Definition
 - When to Use
 - Key Elements
 - Additional Considerations
 - Life of a Holdback
 - LPO Duties
- Indemnity Agreements
 - (same)
- Key Differences
- What If...



Escrow Holdback Agreements

Escrow Holdback

- A written instrument or legal document
- Delivered to the escrow agent
- To hold property
- For a given period of time/until condition met

“Escrow”

A legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition, at which time the third party is to hand over the document or property to the promisee. *Black’s Law*

The word escrow is derived from the Norman-French word for a writing or a written instrument. *Black’s Law, citing Restatement (2nd) of Contracts.*

When to use an escrow holdback



Parties agree in writing to hold funds in escrow post-closing as a condition of closing.

MLS PSA addendum

Funds held for purpose other than exception on title report.

Roof, windows, paint, pest control



Condition cannot be met (work cannot be completed) prior to closing.

In-house fillable form, OR parties provide agmt (use escrow checklist)



Key Elements

- In-House Form
- *Amount*
- *Purpose*
- *Disclose fee*
- *Termination Date*
- *All parties sign (3rd parties)*
- Disbursement (joint instruction)
- Where to remit excess funds
- How to collect add'l funds
- Indemnity
- Dispute Elections (interpleader/hold funds)



- Attorney/Party Provided Instructions
- Interest bearing account?
- Dispute resolution clause?
- Reference exhibits/addenda included?
- LPO not calculate disbursements

- “Can my office comply with the instructions?”
- “Equal bargaining power?” e.g. All parties represented?

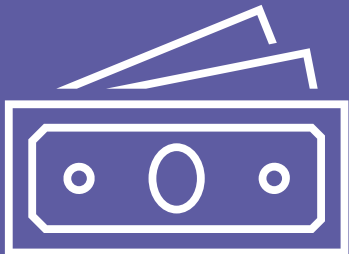
Additional Considerations



Lender Conditions?



Level of risk: length of holdback, amount of holdback, purpose of holdback

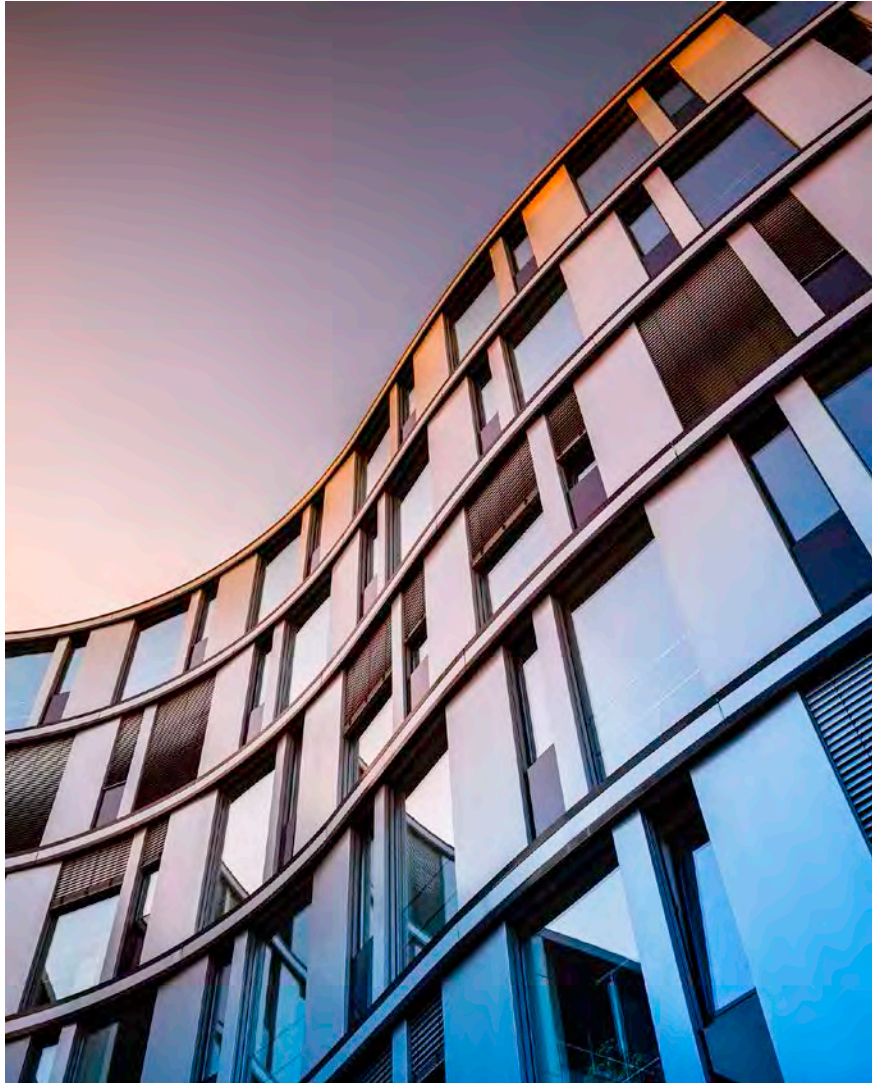


Funds sufficient for purpose?
(request copies of quotes)



Sufficient funds in file? (or additional party deposits needed?)

Life of an Escrow Holdback Agreement



Parties sign escrow holdback agmt.



Parties submit receipts/requests.



Escrow disburses per instruction until funds exhausted or agmt terminates.



Escrow agent closes out escrow file.

LPO Duties



Ethics:

LPORCP 1.1 Competence

LPORCP 1.2 Diligence

LPORPC 1.8 Unauthorized Practice of Law

“An LPO shall not: (a) engage in, or assist others in, the unauthorized practice of law, including the giving of legal advice.”

Duty to follow instructions:

Escrow Agent Registration Act

WAC 208-680-560(1) – requirements for disbursing funds

WAC 208-680-030 – fiduciary duty of funds in trust

WAC 284-29-300 – definition of escrow cites to RCW 18.44.011

Proterra Development Ventures LLC v. First American Title Insurance Co. (Wash. App. 2016)

Facts:

- *Proterra purchased vacant land.
- *Parties executed holdback agmt. for expenses of final engineering approval from the city.
- *FA informed parties of terms FA requires in an agmt. Parties drafted own agmt.
- *Agmt provided: “Invoice(s) along with authorization to pay same may only be made to FA by Seller”
- *Agmt provided: “Any remaining account funds on May 12, 2006 shall be distributed to the Seller”
- *FA disbursed w/out inquiring whether final engineering expenses remained.
- *Trial Ct had granted summary judgment in favor of FA.

Proterra Development Ventures LLC v. First American Title Insurance Co. (Wash. App. 2016)

Outcomes:

Proterra's claim for breach of fiduciary duty:

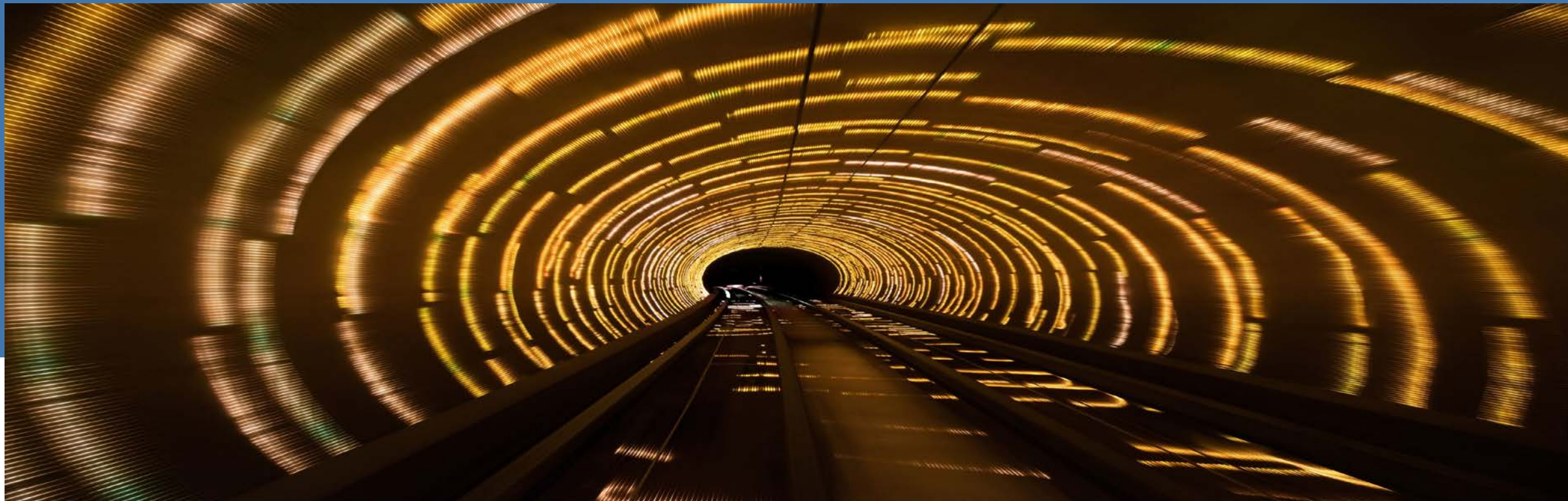
- 1) Breach in drafting – no evidence FA drafted the agmt, failed to protect a party, or agmt was vague or onesided.
- 2) Breach in payment term – no ambiguity because only one reasonable interpretation

Proterra's claim for negligence:

no liability - acted within the scope of instructions

Ct of Appeals affirmed Trial Ct





Indemnity Agreements

Indemnity Agreement

- A written contract
- Where the promisor (seller/client)
- Promises to pay the title company/agent any loss (including attorneys fees)
- Relating to the exception in the title report that will not appear as an exception to coverage at policy
- Indefinitely

“Indemnity”

[1] A duty to make good any loss, damage, or liability incurred by another.

[2] The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.
Black’s Law

“Indemnity Contract”

A contract by which the promisor agrees to reimburse the promisee for some loss irrespective of a third person’s liability.
Black’s Law

When to use an Underwriter's Indemnity Agreement



There's a cloud on title
that cannot be
removed prior to
closing

Lender/Proposed
insured requires cloud
removed/insured over
as a condition of
closing.



UW approves
indemnity

Title agent – dictated
by agency agmt

Direct op – dictated by
P&P

UWs have their own
standard form.



Key Elements

Without Security

- Describes cloud, parties, & legal description.
- Largely boilerplate language.
- Strong indemnity clause - continues indefinitely.



With Security

- Amount of funds is in excess of face value of cloud.
- Holding funds under exclusive control of the title company.
- Deposit in IBA.
- Recommend customer to review with their attorney.

Additional Considerations



Sufficient seller proceeds? Expect UW to require 1.5 – 2 times the face value of the cloud.



Good contact information for lien holder?



Level of risk: type of lien/cloud, ongoing litigation, how long expecting to hold funds

Life of an Indemnity Agreement



Lender, Escrow,
Buyer/Seller aware
cloud cannot be
cleared prior to
closing.

Seller signs UW
indemnity

Seller/Title/Escrow
work to clear cloud.

If secured, funds
disbursed under
listed circumstances.



LPO Duties

- Obtain signatures
- Provide to title company/underwriter
- Avoid giving legal advice or minimizing the significant of the document



Differences & What Ifs

Comparison



Escrow Holdback Agreement

- Take instructions from parties
- Parties must instruct where insufficient funds held
- Party dispute results in elective action (interpleader)
- Lawsuit: parties indemnify escrow agent



Indemnity Agreement

Title Company/Agent discretion on application of funds

Seller responsible to deposit additional funds where insufficient funds held (Indemnity Clause)

Buyer threatened, results in title company stepping in

Lawsuit: indemnitor (promisor, seller) indemnifies title company/agent

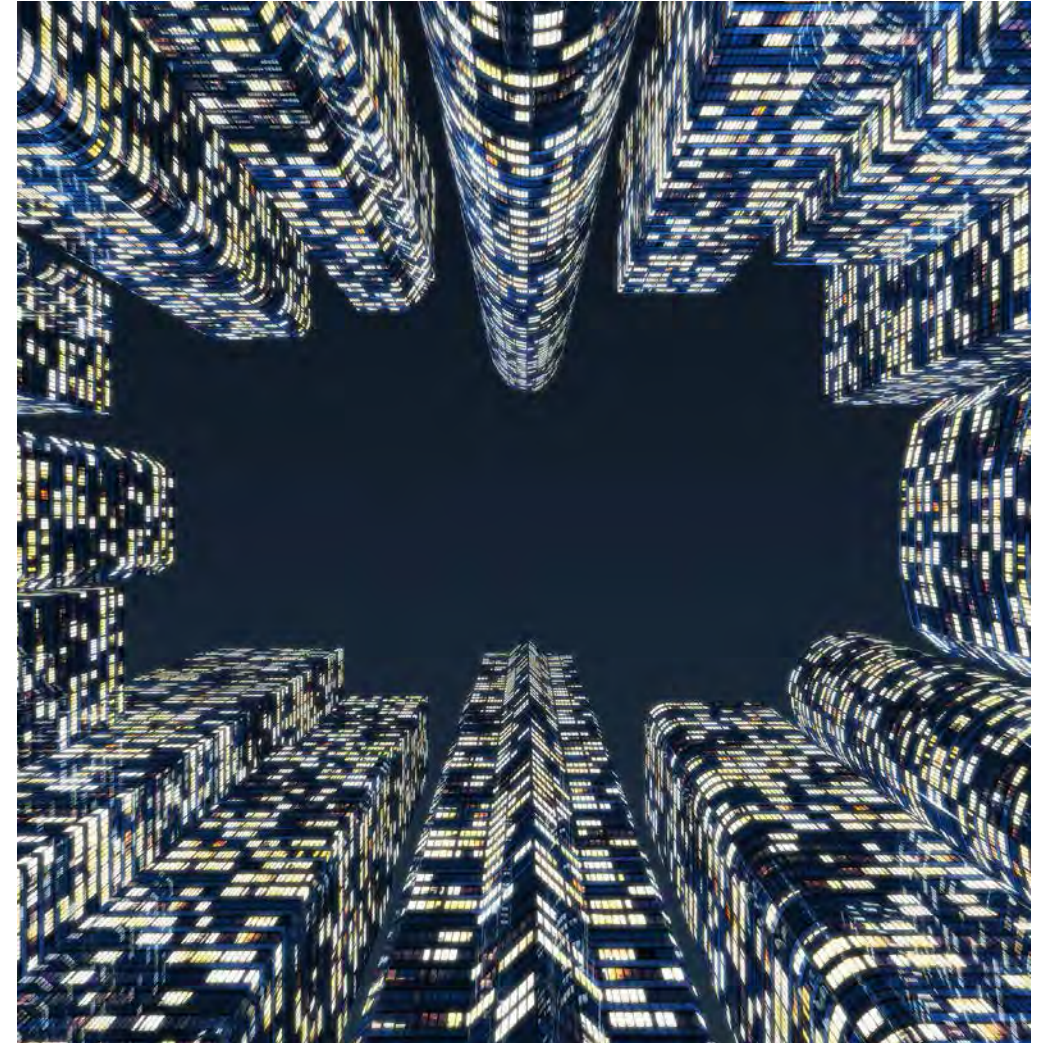
What If. . .

I used an escrow holdback instead of an indemnity agmt

- The signing parties control the funds
- The UW does not have control of the funds and may suffer a loss
- Disputes controlled by the agent elections
- Will take longer to resolve
- Escrow could be pulled into a dispute, harder to recoup expenses

I used an indemnity agmt instead of an escrow holdback

- Potential failure to follow escrow instructions
- Notify your escrow manager
- Rely on the agreements of the parties through closing – standard escrow inst. - without the protections of your company's full holdback agreement



Questions?

