

THE STATE OF TEXAS,
Plaintiff

V.

AMERITRUST TITLE COMPANY
Defendant

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

**TEXAS TITLE INSURANCE GUARANTY ASSOCIATION’S RESPONSE
TO COMMONWEALTH LAND TITLE INSURANCE COMPANY’S
MOTION FOR RELEASE OF ESCROW FUNDS**

NOW COMES the Texas Title Insurance Guaranty Association (the “Guaranty Association”) and files this Response to Commonwealth Land Title Insurance Company’s Motion for Release of Escrow Funds (the “Motion”). The Guaranty Association would show as follows:

I. REQUESTED RELIEF

1. The Guaranty Association respectfully requests the Court to deny the Motion. As the Special Deputy Receiver (“SDR”) points out in its own response to the Motion, Commonwealth is essentially making the same arguments it raised unsuccessfully in previous pleadings and proceedings. By failing to appeal the Special Master’s ruling in January, Commonwealth lost its right to contest turn-over of the funds to the SDR. The matter is now concluded, and Commonwealth’s attempt to “appeal” by calling its effort something else must fail.

II. PROCEDURAL BACKGROUND

2. The Guaranty Association adopts the SDR's recitation of the procedural background contained in the SDR's Response to Commonwealth Land Title Insurance Company's Motion for Release of Escrow Funds.

III. FACTUAL BACKGROUND

3. The facts are largely uncontested. On April 22, 2005, the Villelases deposited \$500 in earnest money with Ameritrust in connection with a contract to purchase residential property (the "Property") located at 6011 Santa Cecilia in Houston. Subsequently, on December 30, 2005, Encore Credit, the Villelases' lender, deposited \$123,213.13 in escrow with Ameritrust Title Company for payment of various third parties, including the Seller and the Seller's lender, Compass Bank, in connection with the Villelases' proposed purchase of the residential property.

4. Ameritrust evidently failed to pay off Compass Bank, a lienholder of the residential property the Villelases purchased. While Compass Bank was supposed to be paid \$85,489.20 to release its lien, Ameritrust only sent \$64,621.18. When Compass Bank rejected the "short" amount, Ameritrust evidently tried again. It sent the "short" amount by cashier's check this time. Compass Bank again rejected the payment as insufficient.¹ The original cashier's check has subsequently disappeared.

5. According to the Villelases, Ameritrust's failure to properly pay Compass Bank eventually led to foreclosure of the property at 6011 Santa Cecilia by Compass Bank. The Villelases were evicted from their home in early June of 2006. The Villelases subsequently filed suit in Harris County against a number of parties, including Ameritrust and Commonwealth Land

¹ It remains unclear why Ameritrust sent Compass Bank the wrong pay-off amount, or why Ameritrust believed that subsequently sending the wrong amount in the form of a cashier's check would make any difference.

Title Insurance Company (“Commonwealth”), the title insurer for whom Ameritrust acted as agent.

6. Commonwealth eventually paid Encore Credit, the Villelases’ lenders the sum of approximately \$155,000² pursuant to the title insurance policy Ameritrust issued on Commonwealth’s behalf. Commonwealth also paid the Villelases \$500 to replace the \$500 in personal funds the Villelases placed in escrow with Ameritrust as earnest money. However, the Villelases lawsuit remained pending, with the Villelases making a number of extra-contractual claims against both Ameritrust and Commonwealth.

7. At some point early in 2009, the Villelases, Zurich (the errors and omissions insurer for Ameritrust), and Commonwealth arrived at a framework for a global settlement agreement. This agreement was never signed. Basically, the parties were to settle their claims against each other in part through negotiation of the Cashier’s Check Proceeds. The Villelases and Commonwealth are presently before the Court because they want to be able to consummate their settlement agreement, and they were counting on the Cashier’s Check Proceeds to do so. The Guaranty Association submits that neither party is actually entitled to such funds.

IV. ARGUMENT

8. The Guaranty Association believes the Cashier’s Check Proceeds belong to the Guaranty Association. Clearly the funds for the initial check came from the Ameritrust Escrow Account at Enterprise Bank, and the cashier’s check was issued in replacement of that prior check. As Ms. Karen Neeley testified at the hearing in this matter, only two parties could possibly have a valid claim for the funds represented by the check. The first is Compass Bank,

² This information was furnished to the Guaranty Association by counsel for Commonwealth in an e-mail dated September 17, 2009.

the intended recipient of the funds. But Compass Bank rejected the check, and subsequently foreclosed on the property the Villelases thought they had purchased. Compass Bank was made whole by its foreclosure. At any rate, Compass Bank has never made any claim for the funds underlying the cashier's check. This leaves the Ameritrust estate, the payor of the now-lost check, as the only valid claimant to the funds. It appears that the Cashier's Check Proceeds were escrow funds. The estate is required by law, and an order of this court, to turn over all escrow funds in its possession to the Guaranty Association for payment of "covered claims," as defined by the Texas Insurance Code. Thus, the Cashier's Check Proceeds should ultimately be paid over by the SDR to the Guaranty Association.

9. It is clear why Commonwealth is attempting to collect the Cashier's Check Proceeds. Any claim Commonwealth might have against Ameritrust, if reduced to judgment, would be considered a general creditor claim. The SDR has reported that there are insufficient assets to pay off general creditor claimants. Thus, Commonwealth does not figure to receive funds from the liquidation of the estate's assets.

10. Furthermore, Commonwealth has filed a claim with the Guaranty Association. This claim was rejected because, among other things, it was a title insurer's subrogation claim, and therefore not a "covered claim" as defined by the Texas Insurance Code. TEX. INS. CODE ANN. Sec. 2602.255(1) (West 2010). Commonwealth did not appeal the Guaranty Association's denial of its claim. Thus, Commonwealth is before the Court in an attempt to recover funds it knows it is not entitled to under either the general distribution scheme of the liquidation estate or the statutory escrow claims process administered by the Guaranty Association.

11. Commonwealth claims that the funds are no longer even escrow funds, though they evidently came from Ameritrust's escrow account, and were paid out in an attempt to pay

Compass Bank, who was an intended recipient of the escrow funds. Even if the funds are not escrow funds, which the Guaranty Association submits they are, the Cashier's Check proceeds would still be the property of the estate, to be used for pay-out to creditors under the Texas Insurance Code's statutory distribution scheme. At best, Commonwealth may have an equitable claim against the estate for its subrogation interest arising from the payments to Encore Credit, the Villelases' lender. Commonwealth clearly has no claim that could attach to the Cashier's Check Proceeds given the statutory nature of the relationship created by the purchase of a cashier's check under Texas law and the fact that the purchase and rejection of the cashier's check occurred long before any subrogation interest was created. Commonwealth is simply not a party to the contractual relationship between Ameritrust and Enterprise. Unrecorded equitable interests are not recognized under the Act. Commonwealth is therefore simply a general creditor of the Ameritrust estate.


12. *Res Judicata.* The Special Master has heard the facts of this case on several occasions and the law and relevant arguments at least twice. On January 6, 2011, the Special Master issued his Memorandum Recommendation recommending granting the SDR's Turnover Application. This recommendation was accepted by the receivership court, which issued an order granting possession of the funds to the SDR—without prejudice to the Guaranty Association's claim to the funds. The funds should eventually be turned over to the Guaranty Association. At the very least, the funds should remain in the estate, subject to the Guaranty Association's Class 1 claim for reimbursement of the claims it has paid to those injured by the conduct of Commonwealth's agent, Ameritrust.

CONCLUSION

The funds belong to the Guaranty Association or the Ameritrust estate, not to Commonwealth. Furthermore, Commonwealth lost its ability to continue to litigate these issues when it failed to appeal the district court's order. The attempt to disguise its late appeal by calling it a new "motion" should not be encouraged. Commonwealth's Motion should be denied.

Respectfully submitted,

By:



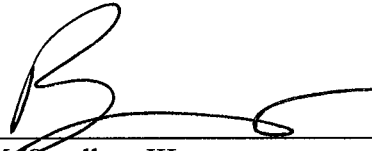
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CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing document has been sent to all parties of record in accordance with Rule 21a, Tex. R. Civ. P., on this the 8th day of April, 2011.



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