

Lawyers

LIABILITY UPDATE

A LIABILITY NEWS BULLETIN FROM GEORGIA LAWYERS INSURANCE COMPANY

~ A Welcome Addition ~

Those of you who take the time to read our newsletters are aware that because of the personal attention required to appropriately address several significant claims, the amount of time spent by Aubrey Smith and our staff in contacting and evaluating potential new insureds has been diminished over the last year and a half. Our commitment to provide this personal service while at the same time growing our family of insureds has prompted us to search for additional quality personnel. We are pleased to announce that we have added to our management a person whom many of you may know.

E. Dale Nellums, Esq., formerly with MAG Mutual Insurance Company, has joined Georgia Lawyers as Claims Director.

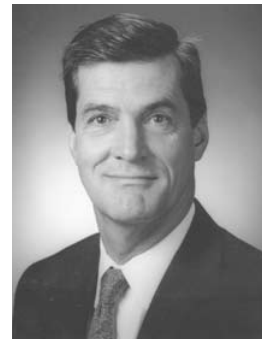
Dale is a lawyer who has spent her last fifteen years with MAG Mutual, managing numerous multi-million professional liability claims. Before working with MAG Mutual, Dale handled professional liability claims at the St. Paul Fire & Marine Insurance Company in Birmingham. She received her



*E. Dale Nellums, Esq.
Claims Director*

undergraduate and law degrees from the University of Alabama and is a member of both the State Bar of Georgia and the Alabama State Bar.

Your Board of Directors feels it important that only the right type of employee become associated with Georgia Lawyers Insurance Company. We therefore were overjoyed when someone of Dale's experience and qualifications was willing to consider joining our Company. Those of you who are unfortunate enough to be subject to a claim will soon meet Dale, and we feel sure you will be pleased with the personal service and attention that you will receive from her.



*J. Littleton Glover, Jr.
Chairman of the Board*

Our President, Aubrey Smith, and our Board of Directors continue to work to insure that Georgia Lawyers Insurance Company provides the best coverage at a competitive price that is available to the lawyers in our state. If any of you have any suggestions or comments, please feel free to call either Aubrey or me.

MALPRACTICE AND THE MORTGAGE MESS



Many of you, particularly those whose practices are in any way related to residential real estate, have kept a close eye on developments in the mortgage lending industry over the past couple of months. The biggest story locally has been the failure and subsequent bankruptcy of HomeBanc, one of the largest lenders in Georgia and Florida over the past decade. The startling thing to many of us about HomeBanc's demise was that it was in no way related to the problems in the subprime lending market that have been in the headlines for most of this year.

Scott Logan

MALPRACTICE AND THE MORTGAGE MESS

HomeBanc was primarily an “A paper” lender, lending almost exclusively to individuals with high credit scores and jobs and incomes that could be documented. The clear indication to most of us who handle real estate closings was, if this can happen to HomeBanc, it can happen to any mortgage lender.

The part of the HomeBanc story that has not been highly publicized, lawyers being generally unsympathetic victims, is that in the course of ceasing operations at the end of July and beginning of August, HomeBanc had issued worthless funding checks to approximately 25 Georgia law firms on 133 loans totaling over 28 million dollars. As a result of the manner in which mortgage loans are funded and disbursed in Georgia, the firms holding these checks were left with substantial holes in their escrow accounts that they had to scramble to cover with personal funds. The firms have ultimately been able to have the loans on which they were holding the bad checks transferred and assigned to them, so now they are in the lending business, able to collect the monthly payments on these loans or sell them for a discounted lump sum to an investor. Neither option is very attractive, and neither will make the law firm whole.

Now, I can practically see those of you who don't handle residential real estate closings scratching your heads and asking, “How the heck can this happen? Who would be foolish enough to disburse money out of your escrow account that hasn't cleared into the account?” Good question, but unfortunately it happens thousands of times a day in law firms across the state, and it is specifically authorized by Georgia law.

In the typical residential closing transaction, which most of you have participated in as a buyer or seller if not as a closing attorney, the closing attorney receives funds from the buyer and lender at the closing table. These funds are disbursed to the seller, seller's mortgage lender, real estate agents, and other parties immediately upon their receipt,

usually prior to their deposit in the attorney's escrow account. O.C.G.A. 44-14-13 provides that the settlement agent shall disburse only collected funds, but goes on to state that notwithstanding this requirement, a settlement agent may disburse in reliance on the deposit of, among other things, a check issued by a lender qualified to do business in Georgia. While most mortgage lenders have adopted the procedure of delivering funds to the closing attorney by wire transfer, which are true collected funds, many have continued to fund loans with their company checks. The competitive environment of the real estate closing practice, a robust economy over the past decade in which the prospect of lenders failing has not been a consideration, and the imprimatur of the legislature through the “Good Funds” statute have combined to lull closing attorneys into a false sense of security regarding this practice. The events of the last month have clearly demonstrated the extent to which this sense of security was misplaced.

While I believe that the attorneys who had the misfortune of closing the HomeBanc loans funded with bad checks acted consistently with the standard of care of attorneys handling real estate closings across the State at that time, and in compliance with the requirements of Georgia's “Good Funds” law, they clearly are not immune from claims of malpractice in the event of their inability to make good the checks that they issued. The only way to avoid the risk of a similar scenario in the future is to disburse funds only upon the receipt of actual, not statutory, good funds. Further, for the protection of the the public more than the attorneys, the “Good Funds” law should be changed to eliminate the current exception for funds received from a lender. Please support the efforts of the Georgia Real Estate Closing Attorneys Association (GRECAA) and the Real Property Law section in pursuing this objective.

Scott Logan
is an attorney with the Fryer Law Firm, P.C. and is President of the Georgia Real Estate Closing Attorneys Association.



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