To: All Rhode Island Policy Issuing Agents of WFG National Title Insurance Company
From: Underwriting Department
Date: October 26, 2021
Bulletin No: RI 2021-02
Subject: Unauthorized Practice of Law in Rhode Island – What can a Title Agent Do?

Rhode Island Policy Issuing Agents of WFG are hereby reminded that certain activities that are part of a residential real estate transaction are considered the practice of law pursuant to *In re William E. Paplauskas, Jr.*: No. 2018-161-M.P.; *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*: No. 2018-162-M.P.; and *In re SouthCoast Title and Escrow, Inc.*: No. 2018-163-M.P. (228 A.3d 43 (R.I. 2020)). As such, non-Rhode Island attorney agents, in relation to a residential real estate closing and the issuance of a title insurance policy:

1. May conduct a residential real estate closing without giving any legal advice or guidance, but must first, verbally and in a writing signed by the agent and acknowledged by the buyer and seller, disclose to the buyer and seller that the closing agent is not an attorney, does not represent the buyer or seller, will not and cannot give legal advice and should the buyer or seller have any legal questions, the closing will be suspended so that legal counsel may be sought. A copy of the disclosure form, adopted by WFG based upon the Court's holding, is attached. (The form is also available on the WFG Underwriting site - wfgunderwriting.com.) Any non-attorney title agent of WFG, or its employees, must comply with the above requirement when acting as a closing agent and must retain a copy of the required, signed disclosure in his or her file. The agent will be required to present a copy of the disclosure as part of any audit conducted by WFG.

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2. May conduct title examinations using title examiners and abstractors only if a Rhode Island licensed attorney examines and reviews the title and makes a determination of marketability or insurability;

3. May not draft a deed unless the same is done under the supervision of and carefully reviewed by a licensed Rhode Island attorney;

4. May draft a residency affidavit required under RIGL §44-30-71.3 on behalf of the seller so long as there are no questions or concerns regarding the seller's residency status, in which event, the seller must consult with a licensed Rhode Island attorney; and

5. May draft a transaction specific durable power of attorney to be used by a buyer or seller in a residential real estate transaction so long as the same is being done in conjunction with the issuance of a title insurance policy for that particular transaction.

If you are interested in the background of the case or in the Court's reasoning behind its holdings, please see the Background section below.

Should you have any questions regarding this or any other matter, please do not hesitate to reach out to your local or national Underwriting Counsel.

Lisa Vesperman Still, Esq.
VP, New England Regional Counsel
Direct Line: 781-660-3078
lstill@wfgtitle.com

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BACKGROUND

On May 29, 2020, the Rhode Island Supreme Court ruled, in a consolidated decision, on *In re William E. Paplauskas, Jr.*: No. 2018-161-M.P.; *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*: No. 2018-162-M.P.; and *In re SouthCoast Title and Escrow, Inc.*: No. 2018-163-M.P. (2020 WL 2781735 May 29, 2020), a triumvirate of cases brought to it by the Unauthorized Practice of Law Committee (the "Committee"), alleging that the respondents had engaged in the unauthorized practice of law when each had engaged in several aspects of residential real estate transactions which the Committee believed constituted the practice of law. Specifically, the Committee argued that the following activities constituted the practice of law, and as such, should be done by attorneys licensed to practice law in Rhode Island:

1. conducting a residential 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.

It is important to understand that the Court only addressed these five (5) activities as they relate to residential real estate. No other activities were discussed or analyzed as to whether they constituted the unauthorized practice of law when done by someone other than a licensed Rhode Island attorney or when done in a different context, such as a commercial real estate closing. The Court specifically stated that they have declined to create a definition of what constitutes the practice of law, and rather makes that determination on a case-by-case basis. *In re Paplauskas, Jr., et al (2020 WL 2781735 May 29, 2020, 17*.) However, the case also makes clear that whether something does or does not constitute the practice of law in Rhode Island is a determination reserved to the Rhode Island Supreme Court, no matter what the legislature has codified regarding the same.

Rhode Island General Laws RIGL §§11-27-5 and 16(a)(1) states that no matter that a corporation is not "a duly admitted member of the bar of [Rhode Island]", "[a]ny corporation, or its officers or agents, lawfully engaged in the insuring of titles to real property" would not be guilty of the unauthorized practice of law when "… conducting its business, and *the drawing of deeds, mortgages, and other legal instruments in or in connection with the conduct of the business of the corporation*." [Italics added.] Additionally, pursuant to Title 27, Chapter 2.6 (the Rhode Island "Title Insurers Act"), title insurance agents are permitted to:

- *determine the insurability of title,*

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- *issue title insurance reports or policies after performance or review of a title search or abstract of title,*
- *handle and disburse escrow, premiums and other funds,*
- *handle settlement or closings,*
- *solicit and negotiate title insurance business, and*
- *record closing documents*. (*RIGL §27-2.6-3)* [Italics added.]

Remember, of the above-permitted activities (those activities in italics), only five (5) related to residential real estate transactions were addressed by the Court, and the Court determined that some of those activities did subvert the Court's authority and constituted the unauthorized practice of law. Regarding those five activities, the Court ruled as follows:

1. **Conducting a real estate closing**. Recognizing that many aspects of a real estate transaction that comprise the practice of law take place between the parties prior to any of them even meeting across the closing table, and that certain acts are ministerial in nature, such as handling escrows and financial matters, 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." *In re Paplauskas, Jr., at 28.* Therefore, title insurance companies and their agents may conduct closings in accordance with the Rhode Island Title Insurers Act and will not be considered to engage in the unauthorized practice of law if the closing agent merely identifies a document, shows a party where to sign, and delivers copies of the documents after they have been signed.

   To prevent a non-attorney closing agent from engaging in the unauthorized practice of law, the Court requires that prior to the start of the closing, the closing agent disclose that: (a) the closing agent is not an attorney; (2) the closing agent does not represent the buyer or seller; (3) the closing agent will not and cannot give any legal advice; and (4) if the buyer or seller have any legal questions, the buyer or seller should suspend the closing and seek counsel from an attorney. To that end, the closing agent must present a written disclosure to the buyer and seller containing all of these warnings, orally reading the warnings to the buyer and seller, and requiring that the buyer and seller read and sign the disclosure, acknowledging their understanding of the warnings. The non-attorney closing agent must also sign the disclosure, giving a copy to the buyer and seller and keeping a copy in the closing agent's file.

   A copy of a form of the disclosure, adopted by WFG based upon the Court's holding, is attached. (The form is also available on the WFG Underwriting site - wfgunderwriting.com.)

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Any non-attorney title agent of WFG, or its employees, must comply with the above requirement when acting as a closing agent and must retain a copy of the required, signed disclosure in his or her file. The agent may be required to present a copy of the disclosure as part of any audit conducted by WFG.

2. **Examining a title for marketability**. Despite title insurance agents being authorized by statute to determine insurability of title, the Court concluded that insurability is essentially the same as marketability, stating in a footnote that "…a title insurance company will not insure a title that is not marketable in the residential real estate context." *Id., at 30*. Therefore, title insurance companies and their agents may, without engaging in the unauthorized practice of law, conduct title examinations only if a Rhode Island licensed attorney engaged or employed by the title insurance company or its agent conducts the examination in order to determine marketability/insurability of title. This applies to title examinations conducted in conjunction with purchases and refinances. The Court does not make any opinion regarding who should conduct the search at the appropriate city or town offices, or prepare the title abstract. As such, WFG title agents may use title examiners and abstractors to search the title, but in order to comply with the Court's decision, a licensed attorney engaged by the title insurance company or its agent(s) must be the one to actually examine the title and make a determination of marketability.
3. **Drafting a deed**. In the Court's opinion, "[t]he deed is the most important document at a real estate closing." *Id., at 32*. Because of the legal effect of the tenancy chosen by the buyers, certain restrictions or encumbrances which may affect title, or particularities in the legal description of the property, the Court stated that drafting of such a document warrants specific legal knowledge and oversight by an attorney, at the very least, despite the statutory permissions given under RIGL §11-27-16(a)(1). *Id., at 32-34*. Therefore, drafting a deed for another constitutes the unauthorized practice of law and WFG non-Rhode Island attorney agents shall not draft a deed unless the same is done so under the supervision of and carefully reviewed by a licensed Rhode Island attorney.
4. **Drafting a residency affidavit**. A residency affidavit by the Seller of real estate, certifying whether the Seller is a resident of the state of Rhode Island, is required under RIGL §44-30-71.3. The affidavit itself is a "standardized form designated by the Rhode Island Division of Taxation" (*Id., at 34*), requiring nothing more than the Seller completing basic information, such as their name, address, social security number, closing date, and the like, signed by the Seller under penalties of perjury and then notarized. Because in most cases the completing of the standardized form by another on behalf of the Seller can be easily

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accomplished and falls within the ancillary or ministerial activities authorized by the Title Insurers Act, a title insurance company and its agents do not engage in the unauthorized practice of law by filling out or drafting the affidavit on behalf of the Seller. However, should the Seller have any questions or concerns regarding his/her residency, the Seller must consult with an attorney, who may be an attorney engaged by or employed by the title insurance company or its agent.

5. **Drafting a durable power of attorney**. Similar to the standardized residency affidavit, the Court opined that in most cases, the durable power of attorney used specifically for residential real estate closings in Rhode Island is a form document, requiring one to merely fill in the names of the principal and agent and other information relevant to that closing. Again like the residency affidavit, it is an ancillary act allowed by title insurance companies and their agents under the Title Insurers Act. But just as with the residency affidavit, a durable power of attorney, not limited in scope, can expose a buyer or seller to tremendous risk if not drafted with that in mind. As such, a title insurance company and their agents do not engage in the unauthorized practice of law when drafting a durable power of attorney to be used by the buyer or seller in a residential real estate transaction so long as the durable power of attorney is transaction-specific, limited to the closing. *Id., at 36.*

To reiterate again, the Court's decision only dealt with five (5) of the permitted activities under RIGL §§11-27-5 and 16(a)(1) and the Title Insurers Act. Those activities, such as handling escrow and recording documents, were not considered in the Court's ruling and as such, are still permitted. Those activities may still be conducted by a title insurance company and its agents, whether attorneys or not, and are not considered to be the unauthorized practice of law when conducted by a title insurance company or its agents.

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