



▶ **BRIGHTER** future

By Lisa A. Tyler
National Escrow Administrator

Sellers in many states have accepted offers from international buyers who claim they are purchasing with cash. Turns out, these buyers are wasting the seller's precious time because they are actually fraudsters who deposit invalid checks with the settlement agent. They send the entire purchase price in one check, including the earnest money. Next, they try to back out of the deal and convince the settlement agent to refund their money before the settlement agent is notified by the bank the check is invalid. Many times they present a check drawn off a foreign bank and/or the funds are from a third-party — not the actual buyer. These are all tricks they use to buy time hoping they can get away with their schemes. Their excuses for canceling are quite elaborate. Read "SELLERS beware!" to discover one such example.

While illegally diverted wire transfers appear to be declining, giving the industry a reprieve from the crime plaguing them for years, it is not time to let our guard down. Read how one escrow officer in the national commercial services office prevented a diverted wire transfer of a subcontractor payment. Read the article titled "STANDARD operating procedures" to learn more.

Next in our series about state withholding, we feature the Aloha State. Sellers of Hawaii real property are subject to 7.25% real estate withholding of the contract sales price. It is the buyer's obligation to withhold, although the appropriate tax remittance forms and withholding is collected through closing and remitted to the state by the escrow officer on behalf of the buyer. In Hawaii, real estate withholding is commonly referred to as HARPTA, which is an acronym for Hawaii Real Property Tax Act. Read the story titled "HAWAII real estate withholding" for detailed information.

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SELLERS beware!

In a recent transaction, the seller accepted the buyer's offer but almost immediately the deal started falling apart. The Buyer's address noted on the offer was located outside the United States. When the buyer's earnest money deposit was due, he had every excuse as to why it was taking so long to send it.

The escrow officer sent wire instructions to the buyer multiple times to deposit the earnest money. In the end, the buyer sent a third-party cashier's check that was in the amount of the full sales price.

Shortly after the escrow officer received and deposited the check, the buyer sent emails explaining why he could not go through with the purchase. The email addressed to the real estate agents and the escrow officer said:

I suppose it is still early morning over there, did you receive my previous email? Due to the devastating news of my failed travel plans, my wife and kids noticed that I was moody all day, hence the need to open up to them about the property purchase deal which was meant to be a surprise. Though she commended my drive towards investment plans, she however frowned at the fact that she was not carried along from the onset. Furthermore the travel agent explained how slim the chances of appealing the visa denial is, hence we gave up on the idea. At this time my wife and I have decided to put on hold/suspend the property purchase deal due to the fact that I was denied a visa and also as it concerns the ravaging global pandemic. The corona virus outbreak has created lots of fears and worries, such that even create lots of limitation regarding traveling. We have resolved to give a shot again at having a property in the USA by mid-next year, hoping that obtaining travel visas for my wife and I will be hitch-free. I sincerely hope the USA relaxes on her stiff immigration laws for

prospective investors, even as we envisage a total eradication of the ongoing pandemic.

I have decided to stick to my wife's counsel, to this end we have resolved that the earnest money payment funds be returned back to us in a bid to have it reinvested back home. If there are any fees/bills incurred by me during the process of putting up an offer do state it out and I will advise that it be deducted immediately. I will furniture you with wire transfer details on where the monies should be sent to.

I await your prompt update on this.

Regards,
Billy Buyer

The real estate agents responded letting him know no funds would be returned without the execution of a termination agreement authorizing a release of the earnest money to the seller. The buyer responded:

Hello,

I received your emails and the contents are well noted. I am unaware that the earnest monies is non-refundable, I have just gone through the PSA now! From the ongoing ordeal relating to my backing out of the property buy deal, like you already know my wife and I have decided to reinvest these funds into other businesses over here in Hong Kong. It is 1:26 AM Thursday 15 October and we are yet to go to bed due to the heated argument over this house buy issues.

The bottom line is that we are not buying this property and no longer interested owning a property in the U.S at this time. To this end I will advise you to remit a portion of the funds via wire transfer as it is been needed immediately to finance part of our reinvestment deal. For clarity purpose I will provide you the details of the beneficiary (business associate's agent) in



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STOP

TELL US HOW YOU
**STOPPED
FRAUD**

settlement@fnf.com or
949.622.4425

[SELLERS beware! — continued]

a separate email. You are to make a wire transfer of \$86,830.00 (Eighty-Six Thousand, Eight Hundred and Thirty United States Dollars) with details as shown in my next email. I hope the wire transfer can be done today (Wednesday your time).

I know there will be a balance of funds in your coffers after this wire transfer for \$86,830.00 is done. It is worthy to mention that you are hereby authorize to deduct any cost associated to this backing out phase of this property buy deal. Fees such as cancellation fee (if any), non-refundable earnest money fee (if any), commission and other expenses should be deducted from this balance left. I will expect you provide a receipt/notification for whatever deduction that will be made. Also I understand that the wire transfer fee will be taken from this balance funds. When this done I will expect you update me on a final balance amount.

Due to the uncertainty associated with the ongoing pandemic, wherein one can no longer walk into the banking hall without a prior booking/appointment I will suggest that you can do an online bank to bank wire transfer from your office, and immediately follow up with a call across to your bank for them to ensure the transfer is effected immediately, is this possible?

What do you think of my idea?

I will expect that you furnish me with a scanned copy of the wire transfer slip for record keeping purposes. I hope this goes fine as my wife and I have been involved in some heated argument these last few hours thus bringing about some mental and emotional stress for me.

Kindly acknowledge this email.

Regards,
Billy Buyer

The bottom line is this: Never disburse against anything other than unconditionally collected funds. Two days after receiving the second email from the buyer, the bank returned the check to the settlement agent as invalid.

The settlement agent was grateful he had not refunded the money as the fraudster asked. The settlement agent resigned as escrow holder and the real estate agents agreed the purchaser was not a serious buyer. The seller put the house back on the market. This buyer was clearly trying to take advantage of the time it takes the issuing bank to return an invalid counterfeit check and defraud the settlement agent.

In previous articles, the Company's amazing settlement agents have identified when checks presented are not local, buying the fraudsters more time. In some cases, they attempt to present a check from a third-party company, buying the fraudsters more time. The scammers regularly present checks from a foreign bank, buying the fraudsters more time.

All these tricks ensure the foreign or third-party checks take longer to get returned to the settlement agents' trust accounts, indicating it is invalid.

Be sure to take your time when reviewing checks. Never succumb to the pressure to disburse without ensuring the funds are collected. Best practices are to receive funds via wire transfer.

Article provided by contributing author:

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STANDARD *operating procedures*

Jolanta Warias, an escrow officer with Chicago Title's national commercial services in Chicago, was administering a construction project wherein the office pays subcontractors directly at each construction loan draw.

Typically, a general contractor hires a subcontractor to perform specific projects that are part of a larger project. The lender loans a portion of the overall loan amount at intervals upon partial completion of the project. The payments are then disbursed to the subcontractors at the direction of the general contractor.

The disbursements are normally made by check. If the payment is made by wire transfer, the standard operating procedure is to verify the bank wire information by telephone using a known, trusted number.

In connection with a construction loan draw request dated December 1, 2020, Jolanta was contacted by email by one of the subcontractors requesting its payment by wire transfer. Jolanta attempted to call and speak to the subcontractor using the number in the file but was unable to reach them. She responded to the email and stated she had left a voicemail message and requested a call back.

Jolanta received a call from someone purporting to be with the subcontractor to confirm wire instructions. However, since she

was unable to verify the wire instructions through her efforts to call through a known number, she sent the payment out by check to the subcontractor.

On December 4, 2020, she was again contacted via email purportedly by the subcontractor stating the payment must be made by wire since their company is undergoing an "audit" that is preventing them from accepting payment by check or credit card.

Jolanta contacted the subcontractor through the contact information on the subcontractor's website. After speaking with their accounting department, she ultimately spoke with owner Pat Countertops and learned that the email did not come from Pat. Pat's email address had been spoofed to make it appear like a legitimate email. She was able to determine the wire instructions were fraudulent and confirmed the subcontractor's email had been spoofed in an attempt to illegally divert the payment to a fraudster's account.

Jolanta followed standard operating procedures. She did not let her guard down, even though the disbursement did not fit the profile description of previously successful diversions, such as seller proceeds, loan payoff funds or a buyer's down payment. Her efforts saved the Company from a potential claim for loss and for that she has received a \$1,500 reward and a letter of recognition.

HAWAII *real estate withholding*

The Hawaii Real Property Tax Act, commonly referred to as HARPTA, applies whenever real property located in Hawaii is transferred. Comparable to FIRPTA (the federal Foreign Investment In Real Property Tax Act of 1980), HARPTA requires a transferee/buyer of Hawaii real property to withhold and pay to the Hawaii Department of Taxation an amount equal to 7.25% of the contract sales price. Many believe HARPTA does not apply under certain conditions, such as when the seller is a resident of Hawaii.

In fact, HARPTA applies to all transfers of Hawaii real property unless an exemption to the withholding applies. Simply put, all transfers of Hawaii real property are subject to HARPTA. Below is a review of some of the exemptions:

The buyer is not required to withhold on the disposition of Hawaii real property if the seller furnishes a completed certification stating:

1. The transferor/seller is a resident person. Sellers that are entities, such as corporations and limited liability companies, may also qualify as resident persons if they are registered with the Department of Commerce and Consumer Affairs to do business in the state of Hawaii or incorporated or formed in the state of Hawaii (single-member LLCs, however, that have not elected to be taxed as corporations will be treated as disregarded entities), or
2. By reason of a non-recognition provision of the Internal Revenue Code as operative under Hawaii Revised Statute or the provisions of any United States treaty, the transferor/seller is not required to recognize any gain or loss with respect to the transfer, or
3. For the year preceding the date of the transfer the property has been used by the transferor/seller as a principal residence, and the amount realized for the property does not exceed \$300,000.

Buyers who receive a certification do not withhold unless they know the certification contains incorrect information. The

certification must be signed by the individual, an authorized signer of a corporation or LLC, a member or general partner of a partnership, or the trustee, executor, or equivalent fiduciary of a trust or estate.

Sellers may also apply for a withholding certificate prior to closing. A withholding certificate waives or adjusts the withholding:

1. If there will not be any gain on the sale, or
2. There will be insufficient proceeds to pay the withholding after payment of all costs which include selling expenses and the amount of any mortgage or lien secured by the property.

The application for the withholding certificate must be sent by the seller to the appropriate office no later than 10-15 days prior to closing. Hawaii will not approve applications sent in later than 10 working days prior to closing or after the closing has occurred.

If the seller is unable to provide the buyer with a certificate proving they are exempt, the withholding and appropriate forms are due to the state by the 20th day after the day of transfer, also known as closing. The appropriate forms are all available on the Hawaii Department of Revenue website: <https://tax.hawaii.gov>

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