



## THIRD PARTY OR CO-CONSPIRATOR?

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Third Party Deposit Instructions authorize the settlement agent to apply the earnest money for the benefit of the buyer. The third party acknowledges the funds are subject to forfeiture and confirms they do not expect a lien against the property to secure re-payment of the funds by the buyer.

The instructions also provide the settlement agent with authorization to share the details of the depositing instrument with the buyer's lender; if necessary. Once executed, the funds are credited for the benefit of the buyer and are considered non-refundable to the remitter.

Without signed Third Party Deposit Instructions, the funds cannot be used and the seller has no ability to recover damages from the buyer, if the buyer defaults under the terms of the purchase agreement. **This is why it is imperative settlement agents who receive earnest money from a third party do two things:**

1. Immediately notify the seller, buyer, and their respective real estate agents funds have been deposited by a third party but cannot be credited to the transaction until the third party executes Third Party Deposit Instructions.

2. Send Third Party Deposit Instructions to the remitter of the funds and buyer for execution.

Failure to do these two things puts the Company at risk. Below is just one example:

A buyer makes an offer to purchase a property for sale. The offer states the buyer will deposit \$5,000 in earnest money into escrow upon the acceptance of their offer. The seller accepts the offer.

The earnest money is deposited with the escrow agent but the funds are not from the buyer named on the purchase agreement; instead the funds come from a limited liability company (LLC). The buyer is the sole member of the LLC.

The funds are receipted into the file and the escrow officer notifies everyone funds have been received. Next, the escrow

*(Continued on reverse.)*



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*(Continued from front.)*

officer sends Third Party Deposit Instructions to the remitter and buyer for execution. Neither the buyer, nor the third party return the instructions to escrow.

Several weeks later, the buyer and seller agree to cancel the transaction. The listing real estate agent instructs the escrow officer to prepare cancellation instructions wherein the earnest money is forfeited to the seller. The instructions are signed by the buyer and seller, and returned to escrow.

As soon as the escrow officer receives the fully executed mutual cancellation instructions the buyer calls. He informs the escrow officer he is demanding the earnest money be returned to the LLC. He informs the settlement agent he knows she cannot use the funds since he, as the managing member of the LLC, never authorized her in writing. No wonder the buyer quickly signed the cancellation instructions — he had nothing to lose.

The escrow officer had no choice but to return the funds to the LLC and notify all other parties the third party demanded the funds be returned. The seller was mad. The seller and the listing real estate agent demanded the escrow company pay the seller their \$5,000 in damages since the escrow officer never notified them the funds came from a third party. The branch had to file a loss and pay the seller.

Unfortunately, this is not the first time something like this has happened. As a matter of fact, there have also been serious issues where the third party deposit came in at the last minute representing closing funds.

The funds were receipted in for the benefit of the buyer and the file is closed. Years later, the third party contacted the escrow company wanting to know why they did not have a lien against the property to secure the re-payment of their loan.

No one knew the funds were a loan because the third party was never contacted. The funds were used without authorization. Stories just like this are expensive and completely preventable.



### MORAL OF THE STORY.

The buyer was an investor who seemed to know exactly how to work the system. He managed to secure the property, but when he defaulted and the deal fell apart he lost absolutely nothing. Meanwhile, the escrow company worked hard on the file opening the order, sending communications out to the principals, and obtaining demands in order to clear title.

In the end, the escrow company was out their time and \$5,000. Do not let this happen to you. Always be sure to obtain signed Third Party Deposit Instructions.

Settlement agents have an obligation to notify the parties to a transaction immediately when funds come from anyone other than the buyer. Sellers and real estate agents need to be sure they review the communications received from the settlement agent, to ensure whether the earnest money is in fact on deposit with no strings attached.

If the funds are closing funds, they cannot be applied for the benefit of the buyer until the remitter has signed Third Party Deposit Instructions. The closing may even have to be delayed or the funds returned if the third party refuses to sign the instructions.

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