

**CLOSING PROTECTION LETTERS: WHAT IS (AND IS NOT)  
COVERED?**

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## I. Introduction

Title agents are customarily authorized, through agency agreements, to sell policies for one or more title insurance underwriters. These agency agreements normally provide that the agent is an agent solely for the purpose of issuing title insurance commitments and policies, and explicitly state that the agent is not the title company's agent for the purpose of conducting settlements or performing escrow services. Authorized title agents also often act separately as the agent for the lender, buyer and/or seller, pursuant to instructions from such "principals" (that only such principals can enforce), in connection with the escrow closing of the transaction that is the subject of the title insurance. A lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services must separately contract with the title insurer for such additional protection by entering into an "insured closing letter" or "closing protection letter" ("CPL"). CPLs have been available since the 1960s. They originally were not title-industry approved forms but, rather, were forms requested by mortgage lenders that were concerned they had no protection against unauthorized or fraudulent actions, or failure to comply with the lender's closing instructions, by the title company's approved closing agent or attorney. Lenders require CPLs because the agency-principal relationship between a title underwriter and a policy-issuing agent or approved attorney is limited to the issuance of a title-insurance policy, and such relationship does not extend to escrow or closing functions.

## II. CPLs – What is Covered?

CPLs specifically apply to escrow closing activities and services performed for title underwriters by approved attorneys or agents who are not employees of the title companies; as a general rule they are not issued on behalf of independent closers over whom the title company has no control. (An "Approved Attorney" is defined in the standard forms of CPLs as "an attorney upon whose certification of title the title insurance company issues title insurance"; an "Issuing Agent" is defined as "an agent authorized to issue title insurance for the title insurance company"). These letters are standardized indemnity agreements given to individually named lenders and recite the specific conditions under, and the extent to which, title insurers will accept liability for the acts or omissions of such parties. For a good, basic explanation of a CPL, see *New Freedom Mortgage Corp. v. Globe Mortgage Corp.*, 2008 WL 3013400 (Mich. App., Aug. 5, 2008), at \*9:

A closing protection letter is typically issued by a title insurance underwriter "[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." 2 Palomar, Title Ins Law, § 20:11. These letters are

issued incidentally to title insurance, and they are “to persuade customers to trust their agents, so that their policies can be sold.” *Id.*, § 20:13. Thus, consideration is given, i.e., the purchase of the insurance policy, and a breach of contract action may be maintained independent of the title insurance policy. *Id.*

A CPL generally applies only with respect to the particular transaction for which it is issued, although title insurers generally also will issue a general or “blanket” CPL that protects a particular lender in connection with escrow closing activities and services involving a designated agent for a specified period of time. The CPL specifically provides that the title insurance company will reimburse the customer named in the letter (when the customer is purchasing the title company's policy) for losses incurred under certain conditions and as the result of certain actions or inactions by the approved agent or attorney. The CPL further provides that the customer's recourse against the title insurer is limited to and defined by the provisions of the letter with respect to such losses. *See Lawyers Title Ins. Co. v. Edmar Construction Co.*, 294 A. 2d 865, 868 (D.C. App. 1972) (describing CPLs, and finding that, because the title company had sent to lenders in the area an “Insured Closing Service” letter that stated it would indemnify the lenders from any loss caused by one of its approved attorneys, the title company was liable for the defalcation of the settlement attorney); *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So. 2d 295, 297 (Ala. 1993) (“The purpose of the closing service letter is to provide indemnity against loss due to a closing attorney’s defalcation or failure to follow a lender’s closing instructions”).

CPLs are intended to indemnify lenders solely against losses incurred as the result of (1) dishonesty or fraud by the Issuing Agent or Approved Attorney in handling the lender’s funds or documents in connection with the specific transaction for which the letter is issued, and (2) failure of the Issuing Agent or Approved Attorney to comply with the written closing instructions of the lender to the extent they relate to status of title to the lender's interest in the land or the validity, priority or enforceability of the mortgage on the land, including the obtaining of documents and disbursement of funds in connection therewith (although not to the extent such instructions require a determination of the validity, enforceability or effectiveness of any such document). CPLs do not, however, provide coverage for such matters as failure of the documents to comply with applicable laws or regulations (including environmental, land use, lender regulation, and zoning) or facts and circumstances regarding the closing or the parties to the closing.

A copy of the standard form of CPL that was developed by the American Land Title Association (“ALTA”) in 1987 is attached hereto as **Exhibit “A”** (“1987 ALTA CPL”). The ALTA’s Revised Explanation of the 1987 ALTA CPL is attached hereto as **Exhibit “A-1.”** The 1987 ALTA CPL provides that it will reimburse the customer (usually the lender) named in the letter for losses incurred under certain conditions and as the result of certain actions or inactions by the Issuing Agent or Approved Attorney. The title insurer is liable for such reimbursement only when the customer is purchasing the title company’s policy. *See Nat’l Mtg. Warehouse, LLC v. Bankers First Mtg. Co., Inc.*, 190 F.Supp. 2d 774, 783 (D. Md. 2002) (“the issuance of a title insurance policy is generally necessary for liability to ensue under a closing protection letter”); *Fleet Mortgage Corp. v. Lynts*, 885 F. Supp. 1187, 1190 (E.D. Wis. 1995) (“the [closing protection] letters are generally only issued in connection with a title insurance policy or

expected policy”). The 1987 ALTA CPL further provides that the customer's recourse against the title insurer is limited to and defined solely by the provisions of the letter with respect to such losses. The 1987 ALTA CPL, and most other forms of CPLs that are issued by title insurers, offer the same form of protection to borrowers, as well as lenders, in residential transactions (and under the new ALTA CPL forms adopted in October 2007 – see discussion below – provide coverage for, in both residential and commercial transactions, not only the addressee who is a lessee, purchaser or lender of an interest in land but also the lender’s assignees and warehouse lender).

On October 17, 1998, the ALTA adopted three new forms of CPLs for special situations: Regulatory (to comply with the stricter standards for CPLs now in force in several states, i.e., in those states where the standard form is unacceptable to the state regulatory authorities and agencies that regulate title insurance); Non-Residential Limitations (to provide the title insurer with the option to limit the size (i.e., the dollar amount) of a non-residential transaction in which it is expected to assume the obligations as set forth in the other provisions of the CPL); and Single Transaction Limited Liability (which applies to a specific individual transaction not covered by the Non-Residential Limitations letter, i.e., where the insurer and the lender who is seeking protection have agreed on (and stated) the aggregate amount of funds to be transferred in connection with the transaction, which amount would otherwise be above the ceiling limitation).

In October 2007, the ALTA Forms Committee adopted three new CPL forms (“2008 ALTA CPLs”), which were designed to replace their predecessor 1998 forms. These forms were introduced as official ALTA Forms on January 1, 2008, after the ALTA Forms Committee considered comments from several interested groups and organizations. The number of ALTA CPL forms available will now be limited to these three new forms, and the substantive changes are the same in each of the 2008 ALTA CPLs. Adverse claims experience may have prompted the changes made in the 2008 ALTA CPLs, as ALTA has “tightened up” the former CPL forms with respect to affirmative coverage and has included additional conditions and exclusions. All three new 2008 ALTA CPLs adopt the concept of the ALTA Regulatory closing protection letter as set forth in that certain Administrative Letter issued by Stephen T. Foster, Commissioner of Insurance of the Commonwealth of Virginia, to All Companies Licensed to Write Title Insurance in Virginia. *See Va. Admin. Ltr.* No. 1995-8 (Sept. 4, 1995) (“Virginia CPL Letter”), i.e., limiting the issuer's liability for fraud, dishonesty or negligence to losses relating to the status of title or the insured mortgage. The Virginia CPL Letter advises title insurers licensed in Virginia that by statute they are single-line (or “monoline”) insurance companies and that CPLs (whether on an individual or blanket basis) may not be used to indemnify lenders for losses that are unrelated to the condition of title to the property or the status of any lien on the property.

All three 2008 ALTA CPLs specify the nature of the relationship between the issuer and the agent or approved attorney and disclaim liability for the acts or knowledge of other third parties and for the economics of the transaction. Also, all three new forms include an arbitration clause that parallels the clause in the 2006 ALTA Owner's and Loan Policies. These forms are available for comment on the ALTA website: <http://www.alta.org/>, and are attached hereto as **Exhibit “B,” Exhibit “C,”** and **Exhibit “D,”** respectively.

As mentioned above, the ALTA Forms Committee considered comments from several interested groups and organizations before issuing the 2008 ALTA CPLs. In response to some of the comments and suggestions received, the ALTA Forms Committee elected not to add sellers as covered parties because covering parties such as sellers, who aren't named as insureds in title policies, may violate the monoline insurance restrictions in some states (except in states such as Ohio where a state-specific promulgated letter expressly covers a seller; *see* O.R.C. § 3953.32(A), adopted in 2007, which requires the title insurance company or the title insurance agent to “offer closing protection to the lender, borrower, and seller of the property, and to any applicant for title insurance”; *see* discussion of specific state statutes later in this article). Similarly, the ALTA Forms Committee decided that the language limiting coverage for losses to matters that “relate to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land” should not be altered or expanded, again because this would violate the monoline insurance restrictions in some states and perhaps increase the amount of claims against title insurance companies under CPLs for violations unrelated to the status of title or the insured's interest in the land.

### III. Legal Issues and Court Decisions

#### A. Do CPLs Constitute Insurance Contracts?

With respect to the issue of whether CPLs constitute insurance contracts, *see Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, *supra*, which held that, because title insurance companies collect no premium for the issuance of CPLs, such letters are not insurance contracts that would enable the insured to maintain a "bad faith" cause of action against the title company for failure to pay claims indemnified against under the such letters. *But see Fleet Mortgage Corp. v. Lynts*, *supra*, 885 F. Supp. at 1190; *Clients' Security Fund of the Bar of New Jersey v. Security Title and Guaranty Co.*, 134 N.J. 358, 377 (1993); and *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 350-52 (1993), which hold that while a CPL does not constitute a separate contract of insurance or provide a separate right of action against the title insurer, it is integrated into and is a part of the title policy (and therefore subject to all the coverages, exclusions, exceptions, conditions and stipulations of the policy, including any arbitration provisions). Both the *Sears Mortgage Corp.* and *Client's Security Fund* cases, *supra*, also expressly acknowledge that insurers issuing CPLs to their insured lenders become subrogated to the position of such insured lenders upon payment of any loss. *See Sears Mortgage Corp.*, *supra*, 134 N.J. at 353; *Clients' Security Fund*, *supra*, 134 N.J. at 372. *See also* Robyn Ann Valle, *New Jersey Development: Title Waves – New Jersey Supreme Court Decisions Bring a Sea Change in the Insurance Industry: A Comment on Sears Mortgage Corp. v. Rose and Clients' Security Fund v. Security Title and Guaranty Co.*, 47 RUTGERS L. REV. 387 (1994).

#### B. Scope and Extent of Coverage.

With respect to the scope and extent of coverage under a CPL, *see Lawyers Title Insurance Corp. v. Frontier Title Company*, 1989 U.S. Dist. LEXIS 11917 (N.D. Ill., Sept. 27, 1989) (not reported in F. Supp.). In this case, the court held that the title company, which had entered into an exclusive agency agreement with the defendant agent, was responsible for funds wrongfully

diverted by the agent in the amount of \$500,000. The court determined that the title company was liable based on the CPL issued to the mortgage lender and the nature and scope of the agency agreement between the title insurer and the agent.

A title company's CPL may, under some circumstances, provide greater coverage than what is provided in the subsequently issued title insurance policy. In *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 Tex. App. LEXIS 4243 (Tex. App. Houston 14th Dist., Sept. 26, 1996), the refinancing mortgage lender's closing agent failed to provide good funds to the original lender (its check was returned insufficient funds) to pay off the existing loan, and the agent subsequently went into receivership and was liquidated. The title company, which insured the refinancing lender, had issued a CPL to the lender. Approximately three months after the closing -- and despite knowing that the agent's check had been dishonored, that the prior mortgage lien had not been released of record, and that the property had been posted for foreclosure by the prior lender -- the title company issued its title insurance policy insuring the refinancing lender that it had a first mortgage lien on the subject property. The title company subsequently paid to the refinancing lender the amount of \$353,194, which constituted the outstanding principal and interest due on its note, and claimed that payment of this amount constituted full satisfaction of its liability to the refinancing lender. But the refinancing lender, to avoid foreclosure of the property by the prior lender, paid the prior lender -- over the title company's objection and after demand for payment by the title company under the CPL -- the sum of \$697,798, which represented the principal, interest, and attorney's fees due on the prior loan. The court held that the title company's \$353,294 payment to the refinancing lender only satisfied the title insurer's obligation under the title policy and did not satisfy the insurer's obligation under the CPL, which guaranteed the replacement of lost settlement funds due to fraud or dishonesty of the agent. The court held that the title company was obligated to pay \$697,798 to the refinancing lender, less the amount of \$353,294 already paid. The court also held that the title company had waived its right to approve or consent to the settlement reached by the refinancing lender with the prior lender with regard to the amount owing on the prior loan -- notwithstanding language in the CPL that the title company would not be liable for losses resulting from the lender settling or releasing a claim without the title company's written consent or for "matters created, suffered, assumed or agreed to" by the lender -- because it had "consistently denied liability under the insured closing letter." *Id.* at \*12. The court even awarded the lender its attorney's fees, stating that "[the title company] is liable, on its own behalf, for breach of the insured closing letter. The breach of the insured closing letter is a breach of contract, and therefore, the award of attorney's fees is clearly proper." *Id.* at \*15 (citations omitted).

*But see Herget Nat'l Bank v. US Life Title Co. of New York*, 809 F. 2d 413, 417 (7th Cir. 1987) (ruling that language contained in "insured closing service letter" only covered losses for settlement funds actually transmitted to title company's approved agent, and not claims for attorneys' fees, lost interest, expenses, or loss of profits); *First Financial Savings & Loan Assn. v. Title Insurance Co. of Minn.*, 557 F. Supp. 654, 662 (N.D. Ga. 1982) (holding that failure of insured to provide title company's approved attorney with good settlement funds caused customer's loss and prevented recovery against title insurer under CPL).

The determination of coverage under a CPL may depend on whether an Issuing Agent or Approved Attorney was an active participant in the fraud and whether the title company would be deemed to have been in the "best position" to prevent the loss. In *First American Title Insurance Co. v. Vision Mortgage Corp.*, 689 A.2d 154 (N.J. Sup. Ct. App. Div. 1997), the court upheld the trial court's judgment in favor of the lender under a CPL. The designated Approved Attorney named in the CPL, the realtor involved in the transaction, and the owner of the property conspired to defraud the lender. They applied for a mortgage loan from the lender in the name of a third party at an inflated value. They then submitted false documents to the lender regarding the financial status of the third party purchaser (an actual person who was unaware of the transaction), along with an inflated "independent" appraisal of the property. The signature of the third party was forged on the mortgage, and the approved attorney notarized the forged signature. The defrauding parties absconded with the mortgage funds, and no mortgage payments were ever made. Following a deficiency after a foreclosure sale, the lender made a demand on the title insurer, claiming it was liable under the CPL. The title insurer then sought a declaratory judgment, arguing that fraud and dishonesty on the part of the Approved Attorney had not been proved, that the lender's loss did not arise out of a covered event because the first-lien status of the loan was not affected, and that the lender had not proved its damages because title insurance does not guarantee the value of the property.

The court first noted that the title insurer had conceded that there was fraud and dishonesty by the Approved Attorney in handling the closing documents. The court then rejected the title insurer's argument that the lender had obtained what it bargained for because it in fact received a valid mortgage on which it was able to foreclose, and because the lender's loss was due to the lender's own overvaluation of the property at the time of the loan. The court reasoned that the lender did not get what it bargained for because although the lender was able to foreclose, the Approved Attorney and his cohorts' scheme denied the lender any opportunity to recover under the other two (besides foreclosure) of the "three remedies for which a lender bargains in a bona fide transaction," i.e., timely payment of the mortgage and recovery of any deficiency. *Id.* at 157. While acknowledging that "not every case in which an Approved Attorney commits a fraud and a lender sustains a loss will trigger title policy coverage under a CPL," the court found that the title insurer was liable for its Approved Attorney's fraud because "this was a sham transaction from the outset." *Id.* According to the court, "the title insurance company was in the best position to prevent the loss created by the fraud and defalcation of the approved attorney." *Id.* The court also found that by making the attorney an "Approved Attorney" pursuant to the CPL, "[the title insurer] put him in the position to steal from [the plaintiff lender] by creating this sham transaction. As such, [the plaintiff lender's] losses fell within the expansive coverage of the title insurance policy." *Id.*

In *Lawyers Title Ins. Corp. v. New Freedom Mtge. Corp.*, 285 Ga. App. 22 (2007) ("*New Freedom I*"), the lender "presented evidence that the issuing agent [an attorney] disregarded the written closing instructions provided to him by the lender and acted fraudulently and dishonestly in handling [the lender's] funds and documents in connection with the closing." *Id.* at 23-24. Therefore, the lender argued, its losses were reimbursable under the CPL issued by the title insurer because of the Issuing Agent's fraud and dishonesty and his failure to follow the closing instructions. The Georgia appellate court held that in this case (involving a sham sale to a straw

purchaser at an inflated value) actual and not constructive fraud on the part of the Issuing Agent was necessary for recovery under the CPL, but also held that the underwriter was nonetheless required to render full indemnity to the lender even if the lender's negligence partially caused the loss. The court found that tort principles of proximate cause and contributory or comparative negligence did not apply in a contract dispute, and stated that, pursuant to the terms of the CPL and Georgia indemnity law, the lender "only had to show a slight causal connection between [the lender's] loss and [the Issuing Agent's] alleged fraud, dishonesty, or failure to follow the written closing instructions in order to obtain full reimbursement." *Id.* at 24. The court further stated that, "even though the CPL did not explicitly mention coverage for the negligence of [the lender], [the title insurer] was required to indemnify [the lender] even if the loss was partially caused by [the lender's] own negligence." *Id.* at 30. This case appears to stand for the unusual proposition that if the Issuing Agent is partially at fault, or the beneficiary of the CPL is partially at fault, the title insurer that issued the CPL is nonetheless responsible for the entire loss. The same result was reached in *Lawyers Title Ins. Corp. v. New Freedom Mtge. Corp.*, 288 Ga. App. 642 (2007) ("*New Freedom II*"). Based on the same facts as set forth in *New Freedom I*, the court in *New Freedom II* ruled that (1) proof of fraudulent intent by the attorney handling the real estate closing was necessary for the mortgagee to recover under the indemnity provisions of the title company's CPL, (2) the CPL entitled the mortgagee to indemnity under the CPL even if its negligence or the negligence of the title company's agent partially caused the loss, and (3) the CPL was not a "policy of insurance" within the meaning of the Georgia statute making the insurer liable for bad-faith failure to pay a covered claim, because "Under Lawyers Title's CPL . . . no second party assumes the risk and significantly no distribution of risk is accomplished." *Id.* at 649.

*But see New Freedom Mortgage Corp. v. Globe Mortgage Corp.*, *supra*, 2008 WL 3013400 (Mich. App., Aug. 5, 2008), in which the court strictly upheld the terms and conditions of the CPL in favor of the title insurance company. In this case, the title insurance company issued closing protection letters to the plaintiff lender in connection with two separate loan transactions (the "Solomon" loan and the "Bowers" loan.) Defendant Scott W. Kissner Title & Escrow Services, Inc. ("Kissner") was the issuing agent. The title insurance policies were issued to Impac Funding Corporation ("IFC"), to whom plaintiff assigned both loans. Although with respect to the Solomon loan, Kissner failed to comply with plaintiff's closing instructions (the loan application contained a false statement regarding occupancy and Kissner was aware that the HUD settlement statement was inaccurate, and the attachment to the HUD-1 settlement statement was falsely attested), the court held that any failure on Kissner's part to comply with plaintiff's closing instructions did not relate to the title or lien under Par. 1(a) of the CPL, and Par. 1(b) of the CPL was inapplicable because it provided that the title insurer was only liable for documents specifically required by plaintiff, and the title insurer "would not be liable for any determination of the 'validity, enforceability or effectiveness of such other document.' Therefore, this provision does not trigger liability." *Id.* at \*10. The court also rejected plaintiff's argument that the title insurer had violated Par. 1(c) of the CPL (covering "[f]raud or dishonesty of the Issuing Agent in handling your funds or documents in connection with such closings") by not collecting certain amounts due the plaintiff at the closing. The court ruled that "[t]hese funds were not due plaintiff; rather, Kissner was supposed to collect them and tender them to the

sellers. Therefore, Kissner's violation of the closing instructions does not trigger liability under this paragraph." *Id.* The court further ruled that:

Although there were discrepancies in the HUD-1 settlement statement and the attachment to the HUD-1 settlement statement was falsely attested, these documents did not belong to plaintiff. Kissner properly disbursed plaintiff's funds, and there were no shortages. Although Kissner violated the closing instructions and failed to notify plaintiff when it learned that Solomon was not occupying the property, there is no evidence that it committed any fraud or dishonesty in handling funds or documents that belonged to plaintiff. Therefore, ¶ 2 does not apply and Commonwealth is not liable to plaintiff for Kissner's violations of the closing instructions.

*Id.*

The plaintiff also argued that the title insurer was liable for Kissner's violations of plaintiff's closing instructions regarding the Bowers loan. The closing instructions for the Bowers loan provided that the attachment to the HUD-1 settlement statement, the occupancy statement, and the application must be fully and properly executed, and that the HUD-1 settlement statement "must be completed properly and completely. It must reflect all applicable charges, costs, refunds, addresses, and proration dates." *Id.* But the court noted that:

On his loan application, Bowers falsely asserted that he intended to occupy the property. However, plaintiff failed to present any evidence that Kissner was aware of this falsity, and ¶ 1(b) of the closing protection letter provided that [the title insurer] would not be liable for any determination of the "validity, enforceability or effectiveness of such other document." Given that there is no evidence that Kissner was aware of this misrepresentation, there is no evidence of fraud or dishonesty on Kissner's part, and ¶ 2 does not apply. Therefore, [the title insurer] is not liable to plaintiff under the Bowers closing protection letter.

*Id.*

In *Lehman Bros. Holdings, Inc. v. Hirota*, 2007 WL 1471690 (M.D. Fla. 2007), the court held that the lender could recover under a CPL claim in Florida under a contract theory, but not in tort. The defendant title company provided title insurance to the plaintiff, Lehman Brothers Bank, on 13 transactions pursuant to closing protection letters. The plaintiff lender based its action against the title company (and several other parties) on the fact that the mortgage applications submitted by the borrowers on all of these transactions contained "false and misleading statements and omissions." *Id.* at \*2. The lender alleged that the defendant title company failed to comply with the written closing instructions of the lender as they related to the status of the titles at issue and by not reimbursing the lender for the actual losses it incurred. The lender furthermore alleged that the title company engaged in fraud, negligence, and misrepresentation in handling the closings. The court, basing its ruling on the "economic loss" rule set forth in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So.2d

532 536 (Fla. 2004), held that, pursuant to Florida law, the “economic loss rule” provides that “parties to a contract can only seek tort damages if conduct occurs that establishes a tort distinguishable from or independent of [the] breach of contract.” *Id.* The court concluded that “Plaintiff’s tort claims are substantively indistinguishable from its breach of contract claims, and therefore, are barred by the economic loss rule. The harm it allegedly suffered is the same in both its contract and tort claims.” *Id.* at \*3. The lender also brought separate claims against the appraiser defendants and the closing agent defendants for breach of fiduciary duty, arguing that these defendants manufactured and provided overvalued appraisals and fraudulent settlement statements to the lender, knowing that the lender would rely on those appraisals and settlement statements to its detriment in determining the value of the mortgage loans. The court dismissed this claim for the same reason as it did the others, stating that “Plaintiff’s breach of fiduciary duty claim is based on the same conduct that provides the basis of its breach of contract claim and is therefore barred by the economic loss rule.” *Id.* at \*5.

In *TierOne Bank v. U.S. Money Source, Inc.*, 2007 WL 2904187 (D. Neb., Oct. 3, 2007), the Federal district court in Nebraska decided a CPL issue related to a dispute between a warehouse lender, plaintiff TierOne Bank (“TierOne”), and defendant U.S. Money Source, Inc. (“USMS”), which originated and sold mortgage loans. The action was for a breach of the warehouse line of credit (“LOC”) agreement between TierOne and USMS. As a condition precedent to any advance, USMS made certain warranties and representations to TierOne, including, among other things, that the eligible note would not be subject to any other security interests and would be a valid and enforceable obligation. When submitting a funding request, USMS would include information from the title insurance policy regarding items such as the name of the borrower, the amount of title insurance, the legal address of the property, and the obligations required of USMS in order to obtain clear title. Sometimes a CPL from the title company would also be part of the funding request, in those cases where TierOne had not previously worked with a particular closing agent. If a CPL was in place, TierOne would accept a designated closing agent even if it had not previously worked with the particular agent. USMS submitted three separate loan funding requests to TierOne, each with a falsified and invalid CPL and commitment for title policy (one falsified CPL, purportedly issued by Stewart Title Company, was signed by a fictitious “Charles Shylock, a licensed Maryland attorney”). After USMS discovered the first fraudulent loan, not later than March 16, 2006, it did not notify TierOne of the fraud until April 25, 2006. USMS did not dispute the fact that the advances it made to USMS for the three loans were not secured by valid and enforceable first liens on the real estate or that the three loans were not marketable and could not be sold on the secondary market. The court found that, based on these facts, USMS breached the LOC agreement, rejecting USMS’s argument that its breach should be excused because TierOne itself materially breached the LOC agreement “by its failure to fulfill its obligation to approve the closing agent.” *Id.* at \*5. According to the court, “[t]he parties’ contract gave TierOne the right to approve the closing agent, but not the obligation to approve the closing agent.” *Id.* The court also noted that “from the time USMS made a funding request to the time the funds were needed was often a matter of a few hours or a single day,” and that the evidence indicated that “TierOne did take reasonable precautions in approving a settlement agent.” *Id.* The court further noted that “[a]ll three loans appeared typical and not unusual. TierOne relied upon information supplied by USMS with USMS’s contractual representations and covenants.” *Id.* The court found that TierOne had the contractual right, but

not the obligation, to approve USMS's choice of the closing agent. The court also pointed out that after the fraudulent loans were discovered, "USMS no longer accept[ed] a third party selected title binder or title commitment." *Id.* at \*7. Finally, the court noted that "[t]he evidence indicates USMS was in a better position to prevent this fraud by the careful selection and verification of the closing agent or title insurance agent." *Id.*

*See also Sears Mortgage Corp., v. Rose, supra*, 134 N.J. at 347 ("[the title insurer] was in a position either to prevent or to protect against the loss suffered by [the purchaser]. Accordingly, we find that [the title insurer] is liable for [the Approved Attorney's] theft"). In a subsequent New Jersey appellate-court decision, *New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guaranty Co.*, 409 N.J. Super. 28 (N.J. Super. A.D. 2009), the court found that the title insurance company was liable to its insureds for the defalcation of funds by the closing attorney, as the title insurer's agent, because the notice of limitation of liability with respect to an agency relationship was sent only to the attorney and not to the insureds. The "Notice of Disclosure" read, in pertinent part, as follows:

THE ATTORNEY RETAINED BY YOU, OR BY YOUR LENDER, CLOSING OR SETTLING THIS TITLE IS *NOT* AN AGENT FOR AND DOES NOT ACT ON BEHALF OF FIRST AMERICAN TITLE INSURANCE COMPANY [sic]. THE COMPANY ASSUMES NO LIABILITY FOR ANY LOSS, COST OR EXPENSE INCURRED BY YOU BECAUSE YOUR ATTORNEY OR YOUR LENDER'S ATTORNEY HAS MADE A MISTAKE OR MISAPPLIED YOUR FUNDS. Because the attorney is not our agent, we assume no responsibility for any information, advise [sic] or title insurance promise the attorney may give or make. Our *only* liability to you is under the terms of the Commitment, Policy and Closing Service Letter if you choose to obtain one.

*Id.* at 32. (The court noted, at 32 fn. 3, that the reference in the language above to "First American Title Insurance Company" was in error.)

The court relied on *Sears Mortgage Corp. v. Rose, supra*, in holding that:

[C]onsistent with the Court's holding in *Sears*, we conclude that, in the context of a real estate closing conducted under the so-called north Jersey method, in order to sever the inherent agency relationship between the title insurance carrier and the closing attorney, the carrier must serve the notice of disclaimer *directly* on the client/insured. The preferred and most effective method of service should include a signed verification from the client/insured acknowledging receipt of the notice. Here, Atlantic Title's [an agent of Stewart Title Guaranty Company] practice of including such disclaimer as part of the insurance commitment packet, that is

sent only to the buyer's attorney, failed to sever that agency relationship.

*Id.* at 37. (Emphasis in text.)

Interestingly, the court also noted that:

Both Stewart Title and Amicus Curiae, New Jersey Land Title Association (NJLTA), assert that after the Court's decision in *Sears*, the title insurance industry successfully lobbied the Commissioner of the Department of Banking and Insurance (DOBI) to approve two forms that: (1) negate the agency status upon which *Sears* is predicated; and (2) provide a type of optional coverage for situations involving attorney misappropriation. These forms are: "Important Notice and Disclosure" (IN & D); and "Closing Service Letter" (CSL). Stewart Title and NJLTA have not presented any evidence, however, that, in approving these forms, the Commissioner addressed the central question under review here: whether inclusion of these notices in a title commitment packet that is sent only to the closing attorney is sufficient to place the insured on notice of the content of these disclaimers. In our view, the *Sears* Court answered that question in the negative.

*Id.*

*But see Nat'l Mtg. Warehouse, LLC v. Bankers First Mtg. Co., Inc., supra*, 190 F.Supp. at 781-84, which found no liability on the part of the title insurer for fraudulent acts of the agent where (1) the CPLs relied on by the lender had expired by their terms prior to the time of such acts, (2) the agency agreement between the title insurer and the agent expressly precluded the agent from conducting settlement or closing business on behalf of the title insurer, (3) no "apparent agency" existed just because the title insurer had issued title policies in the past for transactions in which the Issuing Agent participated as escrow or closing agent, and (4) no title insurance had been ordered by or issued to the lender in connection with the subject transactions.

A title insurance agent is normally under no duty to look out for the best interests of either the lender or the borrower, beyond fulfilling its agreed-to obligations with respect to the specific functions it performs in connection with a real estate transaction in which it is a participant. As stated by the court in *Johnson v. Robinson (In re Johnson)*, 292 B.R. 821, 829 (Bankr. E.D. Pa. 2003):

Title agencies are intermediaries who perform essentially ministerial, administrative tasks associated with documenting the transactions which lenders and borrowers bring to them. They are neither the counselor to the borrower nor the lender. The law imposes no duty of advice and disclosure on a closing agent. Indeed, the request to impose the onerous, impractical and

amorphous duties which the Debtor demands upon the title clerk who conducts a loan closing seems patently unreasonable.

*See also Contawe v. Crescent Heights of Am., Inc.* 2004 U.S. Dist. LEXIS 20344 (D. Pa. 2004) (holding that Pennsylvania does not, absent special or unusual facts, recognize a fiduciary relationship between a title insurance agent and a purchaser of real estate).

With respect to the measure of damages available to a party protected by a CPL, one commentator has stated:

[T]he measure of damages under a closing protection letter depends, at least in part, on how indemnity agreements are interpreted under the laws of different states. Other factors affecting the damages that a lender may recover under a closing protection letter include: (1) the language of the closing protection letter, which may vary from state to state; (2) whether the lender's loss arises from a title defect that would be covered by a title insurance policy; and (3) whether a closing protection letter constitutes insurance under applicable state law.

James Bruce Davis, *The Law of Closing Protection Letters*, 36 TORT & INS. L. J. 845, 853 (2001).

#### C. Relationship Between Title Insurance Companies and Approved Attorneys or Agents.

With respect to the issue of the relationship between title companies and Issuing Agents and Approved Attorneys, *see Lawyers Title Insurance Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818 (N.D. Ill. 1995), which held that even though the title company expressly excluded escrow and closing activities from the scope of coverage of its agency agreement with the title agent, the title company was responsible for defalcation by the agent with respect to escrowed funds and could not recover payments made to insured lenders, under CPLs issued to the lenders, from the bank that maintained the agent's escrow account. The title company routinely issued a CPL, upon request, to a mortgage lender that used the agent's closing and escrow services when the borrower agreed to purchase title insurance through the agent. The court permitted the bank's counterclaim against the title company under the Illinois Title Insurance Act to proceed, based on its determination that the title company "misrepresented the terms and conditions" of the agency agreement because lenders receiving the title company's CPL would assume protection against unauthorized or deceitful acts of the agent was provided unless the title insurer disclosed that such activities were not within the scope of the agency relationship.

In *Sears Mortgage Corp. v. Rose*, *supra*, the court held that the buyer's attorney, who acted as the closing agent and was an "approved attorney" of the title company, was controlled to at least some extent by the title company. The court found that because the attorney failed to remit funds deposited to pay off a mortgage the title insurer would be responsible to the purchaser for the loss, even though the buyer had retained the closing attorney and no CPL had been issued to either the buyer or the lender. *Sears Mortgage Corp. v. Rose*, *supra*, 134 N.J. at 326, 350-52. According to the court, "the title insurer had a duty either to give [the borrower] . . . an

opportunity to insure himself against the risk or, at the very least, to inform him that he was not covered against such a risk.” *Id.* at 347. The court also ruled that because the risk of attorney defalcation implicit in the duty of good faith and fair dealing owed by the title insurer to the purchaser was an incident of the title insurance provided to the purchaser, attorneys' fees were recoverable by the purchaser because of the integration of the CPL into the title policy.

*See also C.A.M. Affiliates, Inc. v. First American Title Ins. Co.*, 306 Ill. App. 3d 1015, 1021 (1999) (finding that title insurer was bound by its agent’s actions at closing and agent’s post-closing failure to pay taxes; court interpreted agency relationship as clearly giving agent authority to waive exceptions shown in title commitment, and rejected title insurer’s argument that loss for failure to redeem taxes was solely related to agent’s “escrow” responsibilities at closing rather than “title” agency relationship); *Clients' Security Fund of the Bar of New Jersey v. Security Title and Guaranty Co.*, *supra*, 134 N.J. at 371-72 (ruling that title insurance contracts are "contracts of adhesion"; that title insurer's duty of good faith and fair dealing required it to at least disclose fact that it was not offering protection to an insured purchaser under an insured closing letter; that title insurer had direct obligation to offer purchaser same protection; and that under the circumstances it was obligated to indemnify purchaser for any loss resulting from agent's theft of escrowed deposits); *Resolution Trust Co. v. Fidelity Nat’l Title Ins. Co.*, 58 F.Supp. 2d 503, 541 (D.N.J. 1999) (holding that the CPL gave at least apparent authority to title agent, who represented both buyer and seller, to close transaction in accordance with lender’s written instructions; and further ruling that agent’s status as independent contractor-agent did not prevent it from concluding that title insurer had voluntarily assumed an extra-policy duty of care with respect to title agent’s negligence and legal malpractice); *Hickey v. Great W. Mortgage Corp.*, 1995 U.S. Dist. LEXIS 4495 (N.D. Ill. April 6, 1995), at \*14-16 (finding conflicting information that would both support and reject an agency relationship between lender and closing agent, so there was genuine issue of material fact); *Mtge. Network, Inc. v. Ameribanc Mtge. Lending, L.L.C.*, 2008 WL 3522449 (Ohio. App. 10<sup>th</sup> Dist., Aug. 14, 2008) (finding that, based on title insurer’s issuance of CPL to lender, title insurer was liable for payment of \$6 million as result of agent’s fraud based on apparent authority of agent because title insurer failed to notify lender that it had terminated agency relationship, even though premiums were never paid directly to title insurer and policies were written and delivered to insured lender without policy jackets).

In *PAL Properties LLC v. Ticor Title Ins. Co.*, Case No. 06-073149-CK, (Oakland County, Mich. Circuit Court, June 4, 2007) (unreported), there was no CPL issued to any party (it was a cash deal), and the issuing agent (acting in its separate capacity as an escrow closer) absconded with or diverted funds from the closing intended for a mortgage payoff. The Circuit Court, based on the language in the title commitment and the agency contract, and the lack of a CPL, ruled in favor of the defendant title company (“Ticor”). The plaintiff-purchaser argued that it should have the benefit of a CPL, even though it was a cash transaction and no CPL was issued to any party. But because it was not Ticor’s fault that the funds weren’t used to pay off the mortgage, and the escrow agent subsequently was cut off as an issuing agent by Ticor (and subsequently went out of business), the court rejected the buyer’s claims of breach of contract, fraud, agency liability, negligence, conversion, loss of profits, and fiduciary duty. This case was appealed to the Michigan Court of Appeals. The appellant-purchaser’s brief (filed October 31, 2007) made

the following highly unusual (and, to the Circuit Court and title insurers, bogus and bizarre) statement, at page 14:

Ticor wants this court to believe that it had *no duty* to insure that its agent properly disbursed the funds. However, it is of paramount importance that the Court understands that the vast majority of mortgage transactions are funded by commercial lenders. This is the realm in which CPLs have developed. Lenders have vast amounts of bargaining power and have therefore demanded these letters to *remove any ambiguities* as to whose responsibility it is in the event of an underwriter's agent failure to disburse. The real purpose of these letters is to make it *clear that underwriters, and not lenders are responsible, and thus to avoid costly litigation on these disputes*. Ticor wants this court to believe that since [the appellant-buyer] did not have a CPL, it is clear that Ticor is not responsible for this loss. This is simply not true. This issue presents a contingency that neither party contracted for, and is therefore, *subject to interpretation* as to who should bear the responsibility. The trial court committed reversible error by not addressing these issues. (Emphasis in text.)

On December 9, 2008, the Michigan Court of Appeals affirmed the trial court's decision. *See PAL Properties LLC v. Ticor Title Ins. Co.*, (Not Reported in N.W.2d), 2008 WL 5158894 (Mich. App., Dec. 9, 2008). The appellate court noted that a title policy was never issued in this matter, and held that because only a title commitment was produced by Ticor, the commitment did not serve to impose a duty upon Ticor to protect the plaintiff from Consolidated's actions because only an actual title insurance policy provides insurance. The court noted that the contract entered into by the parties designated Ticor as principal and Consolidated as its "issuing agent," which limited the scope of Consolidated's agency to the purpose of issuing title insurance only. The court stated that "Plaintiff has provided no authority suggesting that conducting a closing is an inextricable or necessary part of transacting or promoting title insurance business." *Id.* at \*2. Also, according to the court:

Notably absent from the contract is any reference to Consolidated attending closings or performing any duties at closings for the benefit of Ticor. Nowhere in the document does it indicate that Ticor dictated how Consolidated was to proceed with any change.

*Id.* at \*3. The court further noted that:

Ticor's only recourse under the contract would be to terminate the same. Ticor has no contractual right to take over Consolidated's business, to take control of the escrow account, or to force Consolidated to take any action.

*Id.*

The appellate court also rejected the plaintiff's argument that Consolidated acted as Ticor's apparent agent for purposes of the closing, noting that Consolidated was the only entity, other than the buyer and seller, to sign the closing statement and it alone prepared the necessary closing documents (collecting a fee from the plaintiff) and conducted the closing. The appellate court also noted that the plaintiff had no contact with Ticor until several months after the closing. The court also dismissed the plaintiff's claim of negligent supervision, noting in particular that Ticor had the right, but not the responsibility, to examine Consolidated's records and that "Nothing in the title insurance contract serves to impose a duty upon Ticor to protect plaintiff from Consolidated's actions." *Id.* at \*5. The court also rejected the plaintiff's claim of fraud, because the plaintiff "had not alleged that Ticor made any misrepresentation to it whatsoever, at any time, with respect to the escrow monies or whether or not the mortgages would be paid out of the escrow funds." *Id.* at \*6. Finally, the appellate court dismissed the plaintiff's claim that a material dispute existed with respect to whether Ticor breached the title insurance policy, because even though one of the mortgages mentioned in the title commitment was not discharged (albeit through no fault of the plaintiff), "no title insurance policy, under which plaintiff could make a claim of loss, was issued." *Id.* at \*7.

*See also Cameron County Savings Assn. v. Stewart Title Guaranty Co.*, 819 S.W. 2d 600, 604-05 (Tex. Ct. App. 1991), where the court held, on a motion for summary judgment, that no actual or apparent agency relationship existed and that the title insurer had made no promise to cover losses incurred as the result of improper actions of the party closing the loan. The court observed that the fact that a closing agent such as a lawyer or title company might wear "two hats," in selling the title insurance and closing the sale, did not make the title insurance company liable for the mishandling of the real estate closing. Similarly, in *Gerrold v. Penn Title Ins. Co.*, 271 N.J. Super. 50, 55-56 (1994), the court also found that no agency relationship existed and that there could be no liability. The court noted that had a CPL been issued it probably would have reached a different result, but found that "[n]o such agency or promise by the title company exists here." *Id.* at 56. *See also Southwest Title Insurance Co. v. Northland Bldg. Corp.*, 552 S.W. 2d 425, 428 (Tex. 1977) (absolving title insurance company for errors committed in disbursement of funds at loan closing based on theories of actual or apparent authority of agent to bind title company); *Resolution Trust Corp. v. American Title Ins. Co.*, 901 F.Supp. 1122, 1124 (M.D. La. 1995) ("the policy did not insure against the improper disbursement of real estate closing funds, nor did it insure the honesty, fidelity, and competence of its agent. There is no evidence of any written guaranteed closing letters which would evidence a guarantee by [the title insurer] for the proper disbursement of the real estate closing proceeds"); *Sommers v. Smith and Berman, P.A.*, 637 So.2d 60, 62 (Fla. 4<sup>th</sup> DCA 1994) (ruling that lawyer's agency agreement to issue title insurance for title company did not result in liability of company where complaint did not allege defect in title or that title company was closing agent); *Bodell Construction Co. v. Stewart Title Guaranty Co.*, 945 P.2d 119, 125 (Utah App. 1997) (holding that title insurer, by giving its agent authority to issue title policies, did not also give agent implied authority to act as insurer's agent while performing acts of escrow, settlement, and closing transactions); *Security Union Title Ins. Co. v. Citibank (Florida), N.A.*, 715 So.2d 973, 975-76 (Fla.App.1st DCA 1998), *review dismissed sub nom Citibank, N.A. v. Security Union Title Ins. Co.*, 728 So.2d 200 (Fla.

1998) (holding that title insurer, which allowed attorney to act as its agent to prepare title commitments and issue policies, conferred no actual or apparent authority in connection with closing of transaction, and was thus not vicariously liable to mortgage lender for alleged fraud of attorney as closing agent for borrower); *Universal Bank v. Lawyers Title Ins. Corp.*, 62 Cal.App.4<sup>th</sup> 1062, 1066-67 (Cal. App. 2<sup>nd</sup> Dist. 1997) (ruling that title insurer was not liable for alleged fraudulent acts of agent in connection with escrow closing where unambiguous terms of agency agreement specifically excluded escrow and closing activities, and lender had not requested an available CPL); *Glynn v. New Hampshire Ins. Co.*, 578 So.2d 36, 37 (Fla. 4<sup>th</sup> DCA 1991) (holding that agent can be agent of insurance company for one purpose and agent of insured for other purposes); *Bergin Financial, Inc. v. First Am. Title Ins. Co.*, 2008 WL 268823 (slip copy, U.S.D.C. E.D. Mich., Jan. 29, 2008), at \*2-3 (holding that policy-issuing agency contract between agent and title insurer expressly limited scope of contract to issuance of title commitments and title policies and, absent an insured closing letter, did not authorize agent to close real estate transactions as agent for title insurer; alleged fraudulent actions occurred when agent was performing closing activities outside scope of his authority as title-policy issuing agent and therefore could not be imputed to title insurer); *GE Capital Mortgage Services, Inc. v. Privetera*, 346 N.J. Super. 424, 433-34 (App. Div. 2002) (holding that agency relationship between title insurance company and buyer's attorney was terminated when bankruptcy court approved sale of property free and clear of all liens, and first mortgagee of debtor was not entitled to relief due to attorney's defalcation and failure to pay amount due on first mortgage because it was not beneficiary of CPL issued by title insurer to new mortgagee in connection with mortgagor-buyer's purchase of property); *Proctor v. Metropolitan Money Store Corp.*, 579 F.Supp.2d 724, 736-37 (D.Md. 2008) (court dismissed title insurer from suit seeking to hold insurer liable for title agent's alleged participation in fraudulent foreclosure-rescue scheme, and stated that, "The employment of an agent for purposes of issuing title insurance does not (at least by itself) establish an agency relationship for purposes of settlement and closing activities undertaken by that title agent").

*See generally* Joyce D. Palomar, TITLE INS. LAW 2-12 (1994) ("Underwriting and agency agreements generally . . . limit the underwriter's responsibility for agents' activities as escrowees in real estate closings"); Richard J. Landau and Kristin M. Tsangaris, *The Mortgage Fraud Epidemic*, S & P's THE REVIEW OF BANKING AND FINANCIAL SERVICES, Vol. 22 No.4, April 1, 2006 ("In the absence of an insured closing letter . . . a majority of cases hold that . . . the title insurer has no liability for fraud or other misconduct in connection a closing").

#### D. Rights and Remedies of Title Insurers for Recovery of Losses.

The 1987 ALTA CPL (as well as the new 2008 ALTA CPLs) provides that when the title company has reimbursed the customer for a loss covered under the letter, it becomes subrogated to all rights and remedies that the customer would have had against any person or property if such reimbursement had not occurred. With respect to the rights and remedies of title insurers for the recovery of losses incurred in paying claims under CPLs, *see American Title Insurance Co. v. Burke & Herbert Bank & Trust Co.*, 813 F. Supp. 423 (E.D. Va. 1993), *aff'd without opinion*, 25 F.3d 1038 (1994). In this case, the U.S. District Court held that the title insurer was not entitled to a right of equitable subrogation against the payor bank for delay in honoring checks for escrowed funds misappropriated by the title insurer's agent, Landmark Title Corporation

(“Landmark”). Landmark was one of the title insurer’s authorized agents pursuant to a written agency agreement. Landmark maintained a trust account with the defendant bank in connection with real estate closings that it handled. A vice president of Landmark had been embezzling funds from the trust account. When confronted by the bank with a deficiency in the trust account involving three checks to payees at real estate closings, this individual persuaded the bank not to dishonor the checks. As a result, the bank did not immediately dishonor and return the checks, waiting until four days with respect to two of the checks, and eight days with respect to the other check, to return them to the respective payees stamped “Insufficient Funds.” This delay violated the strict statutory time limits under a Virginia banking statute, which provided a statutory penalty (in the amount of the check) for failure or a payor bank to pay or return the check or send notice of dishonor until after midnight of the banking day of its receipt of the check.

The title insurer, pursuant to its obligations under CPLs issued to the payees in connection with certain real estate transactions for which it had provided title insurance through Landmark, reimbursed the payees for their losses. The title insurer then brought an action seeking to recover the amounts it had paid out on the theory of equitable subrogation, based on the bank’s violation of the Virginia banking statute. Shortly after instituting this action, the title company obtained the dishonored checks from the original payees (which the payees endorsed in favor the title company), along with written assignments from the payees of all their right, title, interest and claims arising out of the checks. The court held that the title insurer was not a party entitled to protection under the Virginia banking statute, stating that “where, as here, a party becomes a holder, transferee and assignee of checks after their untimely return by a payor bank, that party has no standing to bring a cause of action for the bank’s violation of [the applicable Virginia banking statute].” *Id.* at 429. The court further ruled that no right of equitable subrogation existed, because the title insurer would have been required under the CPLs it had issued to reimburse the customers for the losses they incurred due to the agent’s defalcation even if the bank had complied with the banking statute and timely dishonored the checks for insufficient funds. According to the court, “[t]hat the original payees elected to pursue their rights against [the title insurer] under the Closing Protection letters, and did not pursue the separate and independent alternative of suing [the bank] under the [the applicable Virginia banking statute], does not provide [the title insurer] with any equitable rights against [the bank].” *Id.* at 430.

## **V. Statutory and Regulatory Restrictions**

Although the ALTA forms of CPLs generally are used in most states, some states restrict, limit, or prohibit their use. The principal statutory and regulatory rationale for prohibiting or restricting the use of CPLs by title insurance companies has been that their issuance results in the unauthorized writing of fidelity or surety coverage. The issuance of such coverage also may violate the single-line (or “monoline”) nature and scope of the title insurer’s business activities that are authorized by applicable state statutory or regulatory provisions (or the title company’s charter).

#### A. Statutory References, Restrictions and Prohibitions.

Most states do not have promulgated or filed CPLs and permit the use of the approved ALTA forms, although “monoline” statutes in some states prohibit title insurers from engaging in any other line of insurance other than title insurance. State regulators in these states generally take the position that the issuance of CPLs, which assure as to certain actions of the title insurer’s own policy-issuing agent or approved attorney, do not violate the state’s monoline statute so long as a policy is being issued in connection with the subject transaction. For example, the State of Washington has a statutory provision, RCW § 48.05.330(3), which provides that “[a] title insurer shall be a stock insurer and shall not transact any other kind of insurance.” (But Washington does not prohibit the use of the ALTA form CPLs and does not have a promulgated or filed form of CPL). Similarly, Alabama statutorily defines “title insurance,” pursuant to ALA. CODE § 27-5-10, to mean only “insurance of owners of property, or others having an interest therein or liens or encumbrances thereon against loss by encumbrance or defective titles, or invalidity of an adverse claim to title.” (Alabama also does not prohibit or restrict the use of the ALTA forms of CPLs or require a special form of the letter.) But a closing letter that assures as to the conduct of a buyer’s attorney, who is not a policy-issuing agent of the underwriter, would likely be prohibited.

1) **Arizona.** In Arizona, as the result of the failure of several escrow and title agencies – including massive looting of trust accounts – most residential real estate contracts now contain a provision for the delivery of a CPL where the escrow company is an agent for the title company. An Arizona statute also states that, with respect to a residential real estate transaction where the escrow agent is a title insurance agent employed by the buyer or seller, the agent shall disclose to the buyer and seller that “the title company may offer a CPL that provides protection for the loss of escrow monies due to fraud or dishonesty of the escrow agent.” *See* AZ. STAT. § 6-841.0. The form of promulgated CPL issued in Arizona is virtually the same as the ALTA CPL except that there are three separate letters for lender, buyer and seller.

2) **Arkansas.** Arkansas recently enacted the Arkansas Title Insurance Act, A.C.A. § 23-103-401 *et seq.* (the “Act”), which became effective January 1, 2008. Section 23-103-405(c)(1) of the Act specifically addresses CPLs. Under § 23-103-415 of the Act, the regulation of title insurance was placed under the umbrella of the Arkansas Insurance Department for the first time, and the Insurance Commissioner for the State of Arkansas was granted the authority to issue rules to supplement the Act. In response, the Insurance Commissioner has issued Rule 87 (Title Insurance), which deals specifically with CPLs at Section 14 (page 11 of Rule 87). Pursuant to § 23-103-405(c)(1) of the Act and Section 14 of Rule 87, all title insurers are now required to offer, through their agents, certain protections to *all* parties to a transaction, including lenders, borrowers/purchasers, and sellers. Section 23-103-405(c)(3) of the Act provides that “the settlement protection shall conform to the terms of coverage and form of instrument as may be filed with the Insurance Commissioner,” and “shall indemnify a person solely against loss of closing funds because of the following acts of a closing agent, title insurance named employee, or title insurance agent:

(A) Theft or misappropriation of closing funds; or

(B) Failure to comply with written instructions from the proposed insured when agreed to by the closing agent, employee, or title insurance agent as it relates to the status of the title to the interest in land or to the validity, enforceability, and priority of the lien of a mortgage or deed of trust on the interest in land.”

Section 14.D. of Rule 87 provides the provisions, coverages and exclusions that must be contained in a CPL. The provisions and coverages set forth in § 14(d), which are set forth below, must be contained (at a minimum) in every CPL, and are broader than those contained in § 23-103-405(c)(3) of the Act set forth above:

(1) The parties to be afforded protection along with a brief description of their relationship to the transaction covered;

(2) A description of the transaction for which the letter is being issued;

(3) Provide coverage for the failure of the title insurance agent, any title insurance agency, or person conducting a closing of the transaction to comply with any written closing instructions to the extent that they relate to:

(a) The status of the title to said interest in land or the validity, enforceability and priority of any lien of a mortgage on this interest in land, including obtaining any documents or the disbursement of funds necessary to establish such status of title or lien;

(b) Obtaining any other document, specifically required by any party to the transaction, but only to the extent the failure to obtain such other document affects the status of the title to said interest in land or the validity, enforceability and priority of the lien of any mortgage on the interest in land; or

(c) Fraud in handling of any funds or documents in connection with such closings to the extent such fraud relates to the status of the title to said interest in land or to the validity, enforceability, and priority of the lien of any mortgage on the interest in land.

Section 23-103-405(c)(1) of the Act states that “a title insurer must give notice of the availability of closing protection to all parties to a title transaction in which it is contemplated that title insurance may be issued.” In order to fully comply with this section of the Act and Rule

87, the author's employer, First American Title Insurance Company, now requires that its agents obtain from each party to a transaction an executed Notice Regarding Closing Protection Letter ("Notice") and that each original executed Notice be held by the agent for the benefit of First American. Each party to the transaction is required to mark the line next to the option he or she chooses and execute the Notice. The Notice may be provided with the Commitment for Title Insurance or presented at the closing table, as the agent chooses. Each original executed Notice may be kept in the agent's file for that particular transaction, or all original executed Notices may be maintained in one central location so long as a specific Notice can be retrieved when requested.

Since each party to a transaction (including the seller) may request a CPL, multiple CPLs may be issued in a single transaction. The Act and § 14(c) of Rule 87 provide that a charge (payable solely to the title insurer) for closing protection coverage shall be filed with the Insurance Commissioner (\$25.00 according to recent filings). This amount should be set forth on the HUD-1 Settlement Statement. The present practice of title insurers is to charge one fee per transaction, although it is unclear under the Act and § 14(c) of Rule 87 whether a fee could in fact be charged for each CPL issued in a particular transaction.

In response to the Act and Rule 87, title insurers in Arkansas have filed the following form of CPL, which has been approved by the Arkansas Insurance Commissioner:

## **CLOSING PROTECTION LETTER - SINGLE TRANSACTION LIMITED LIABILITY**

### **BLANK TITLE INSURANCE COMPANY**

Name and Address of Addressee:

Date:

Name of Issuing Agent or Approved Attorney (hereafter, "Issuing Agent" or "Approved Attorney", as the case may require):

*[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Transaction (hereafter, "the Real Estate Transaction"):

Re: Closing Protection Letter

Dear:

Blank Title Insurance Company (the "Company") agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with

the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney, provided:

- (A) title insurance of the Company is specified for your protection in connection with the closing of the Real Estate Transaction;
- (B) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, (iii) lessee of an interest in land or (iv) a seller of an interest in land; and
- (C) the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed \$2,000,000.00.

and provided the loss arises out of:

- 1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
- 2. Fraud of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closing to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

#### Conditions and Exclusions

- 1. The Company will not be liable to you for loss arising out of:
  - A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.
  - B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
  - C. Defects, liens, encumbrances or other matters in connection with the Real Estate Transaction if it is a purchase, lease or loan transaction except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.
  - D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.

- E. Your settlement or release of any claim without the written consent of the Company.
  - F. Any matters created, suffered, assumed or agreed to by you or known to you.
2. If the closing is conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.
  3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation. The Company retains the ability to recover from you any reimbursement you received for which the Company has previously paid you under this letter. The liability of the Company for any amounts paid to you shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right to such reimbursement.
  4. The Issuing Agent is the Company's agent only for the limited purpose of issuing title insurance policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.
  5. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_. When the failure to give prompt notice shall diminish the amount the Company could have recovered in the absence of the delay, the liability of the Company hereunder may be reduced to the extent of such diminution. The Company is not liable for a loss if the written notice is not received within one year from the date of the closing. Coverage under this letter is limited to transactions closed in Arkansas.

Any previous closing protection letter or similar agreement is hereby cancelled with respect to the Real Estate Transaction.

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
 (The words "Underwritten Title Company" maybe inserted in lieu of Issuing Agent)

3) **California.** Pursuant to WEST'S ANN. CAL. INS. CODE § 12340.3(e), in California the "Business of Title Insurance" includes:

The act of an insurer in furnishing in writing to a prospective purchaser of the insurer's title policy a statement which assures, and assumes the liability for, the proper performance of services necessary to the conduct of a real estate closing performed by an underwritten title company with whom the insurer maintains an underwriting agreement. A title insurer may charge a reasonable fee in connection with the furnishing of any such statement. No rate or form filing shall be required with respect to any such statement.

According to Miller and Starr, 3 CAL. REAL EST. § 7:3 (3d ed.), an “underwritten title company” is:

A company that is in the business of preparing title searches, title examinations, and preliminary reports on which a title insurer writes title policies is required to be licensed as an underwritten title company. The underwritten title company makes the title search and prepares the preliminary report. The underwritten title company also issues the policy as a limited agent of the title insurer pursuant to the terms of the underwriting or agency agreement with the title insurer.

In Northern California, the underwritten title company also traditionally acts as the escrow agent in the transaction. Whereas, in Southern California, escrows are frequently handled by independent escrow companies regulated by the Department of Corporations. A title insurer does not need to use an underwritten title company but may itself perform title searches and handle escrows.

Miller and Starr also state, at § 7:3, *supra*, with respect to the use of closing protection letters, that:

When an underwritten title company handles the escrow for the transaction and issues the insurer's insurance policy as a limited agent of the insurer, the insurer can agree with one or more parties to the escrow (usually the new lender) to undertake designated responsibilities relative to certain conduct of an underwritten title company acting as the escrow agent through the issuance of a Closing Protection Letter, generally the ALTA Closing Protection Letter. These letters were developed to respond to the needs of lenders who want to ensure that their loan proceeds are properly handled and applied by the escrow holder. In the event they are not, the lender wants the financial strength of the title insurer to back any loss rather than just the financial strength of the escrow. By issuance of the Closing Protection Letter, the insurer agrees to provide indemnity against loss due to the escrow's defalcation or breach of instructions subject to the conditions and exclusions of

the letter [citing WEST'S ANN. CAL. INS. CODE § 12340.3(e), *supra*]. Closing Protection Letters are commonly issued by title insurers throughout California.

By statutory limitation Closing Protection Letters can only be issued by a title insurer for an underwritten title company handling an escrow [citing WEST'S ANN. CAL. INS. CODE § 12340.3(e), *supra*]. There is no statutory authorization for a title insurer to issue a Closing Protection Letter relative to an escrow being handled by either an independent escrow or a controlled escrow company. [Emphasis in text].

As noted by Miller and Starr, the California enabling legislation only allows title insurers to issue CPLs for “underwritten title companies” (agents), not for escrow companies that are not agents. Therefore, when an escrow company is involved, it is common to do a sub-escrow, where the lender funds to the direct office of the title underwriter or to an agent (for whom a CPL is issued) to make the payoffs of the prior mortgages or deeds of trust. The direct office or agent then funds the balance to the escrow company. Title companies in California generally do not insure based upon representations of escrow companies that they have paid off prior deeds of trust.

4) **Florida.** Florida authorizes the issuance of CPLs, pursuant only to an instrument approved as to form and content by the Florida Department of Insurance. *See* FLA. STAT. ANN. § 627.786(3) (authorizing title insurers to issue CPLs); 690-186.010, F.A.C. 690.010 (setting forth form and content of approved CPL). The approved form of letter (which is referred to as a “closing service letter”) differs from the ALTA CPL in the following respects: (1) at the end of A.1. under “Conditions and Exclusions,” a sentence has been added stating that: “This paragraph shall not be applicable when such binder or commitment has not been required by the lender prior to closing”; (2) a new provision, A.4, has been added to the Conditions and Exclusions, which states that the following is excluded from coverage: “The periodic disbursement of construction loan proceeds or funds furnished by the owner to pay for construction costs during the construction of improvements on the land to be insured, unless an officer of the company has specifically accepted the responsibility to you for such disbursement program in writing”; (3) a sentence has been added at the end of C. under the Conditions and Exclusions, which limits the title company’s liability to the amount of the title insurance binder, commitment or loan policy to be issued and provides that liability of the title insurer under the closing service letter shall be “coextensive” with liability under the title policy issued in connection with the particular protection (so that payment under either the policy or the closing service letter will reduce, by such amount, liability under the other document); (4) a sentence has been added at the end of D. under the Conditions and Exclusions, which provides that the title company will not be liable under the closing service letter unless it receives written notice within 90 days from the date of discovery of any loss; (5) a new provision E. has been added to the Conditions and Exclusions, which provides that nothing in the closing service letter “shall be construed as authorizing compliance by any Issuing Agent or Approved Attorney with any such closing instructions, compliance with which would constitute a violation of any applicable law, rule or regulation relating to the activity of title insurers, their Issuing Agents or Approved Attorneys, and their

failure to comply with any such closing instructions shall not create any liability under the terms of this letter”; and (6) a sentence has been added, at the beginning of provision F., stating that “The protection herein offered will be effective until cancelled by written notice from the [title insurer].”

5) **Illinois.** An Illinois statute, 215 ILCS 15 5/3, defines the title insurance business as including the issuance of CPLs when conducted or performed in contemplation or in conjunction with the issuance of title insurance. The standard forms of ALTA CPLs are used in Illinois.

6) **Iowa.** Iowa is the only state that prohibits the sale of title insurance. In 1947, the Iowa General Assembly prohibited the sale of title insurance in Iowa, and the Iowa Supreme Court upheld the prohibition. *See* S.F. 370, 52d Gen. Assemb., ch. 258 § 5, at 333- 34 (Iowa 1947) (enacting IOWA CODE § 515.48(10); *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 30 (Iowa 1977) (“Its [IOWA CODE § 515.48(10)] uniqueness does not make the Act vulnerable to constitutional attack”). In Iowa titles typically are secured by attorney title-abstract opinions, which are required by lenders. To meet the needs of secondary mortgage lenders for additional assurance, Iowa created a statutory title-insurance equivalent, the Title Guaranty Program, which provides for the issuance, by the attorney rendering a title opinion, of a “Title Guaranty Certificate.” *See* IOWA CODE §§ 16.3(15), 16.91. *See also* Shannon B. Strickler, *Iowa’s Title Guaranty System: Is It Superior to Other States’ Commercial Title Insurance?* 51 DRAKE L. REV. 385, 389-90 (2003):

In the Title Guaranty enabling statute, the Legislature gave the Iowa Finance Authority, of which Title Guaranty is a division, all powers necessary to fulfill its purposes and duties. This power includes the ability to guarantee titles on Iowa real property in a manner acceptable to the secondary market. Further, the Title Guaranty Division is authorized to establish the price and collect the fees of the guarantees and to reinsure the guarantees against any related loss. The authority to reinsure allows Title Guaranty to give a portion of the risk to other insurers in order to protect itself and the insured while still maintaining complete legal liability.

The Iowa Title Guaranty Division "sells Title Guaranty Certificates which provide low cost title protection for any real estate located in the state of Iowa." The owner, the lender, or both may be issued a Title Guaranty Certificate. The Title Guaranty Certificates provide the same coverage as provided in other states by title insurance policies obtained from a member of the American Land Title Association. The certificates protect against "loss or damage caused by defective titles to Iowa property," but at a low cost.

Pursuant to IOWA CODE § 16.93(1), the Iowa Finance Authority “through the title guaranty division may issue a closing protection letter to a person to whom a proposed title guaranty is to be issued, upon the request of the person, if the division issues a commitment for title guaranty or title guaranty certificate.” But the CPL protects against loss of settlement funds due only to

the theft of settlement funds or failure by the participating attorney or participating abstractor to comply with written closing instructions of the person to whom a proposed title guaranty is to be issued relating to title certificate coverage. *Id.* Furthermore, pursuant to IOWA CODE § 16.93(3):

The division board shall establish the amount of coverage to be provided and may distinguish between classes of property including, but not limited to, residential, agricultural, or commercial, provided that the total amount of coverage provided by the closing protection letter shall not exceed the amount of the commitment or title guaranty to be issued. Liability under the closing protection letter shall be coextensive with liability under the certificate to be issued in connection with a transaction such that payments under the terms of the closing protection letter shall reduce by the same amount the liability under the title guaranty certificate and payment under the title guaranty certificate shall reduce the liability under the terms of the closing protection letter.

The division board of the Iowa Finance Authority also “may adopt a required fee for providing closing protection letter coverage.” IOWA CODE § 16.93(4). Furthermore, “[t]he division shall not provide any other coverage which purports to indemnify against improper acts or omissions of a person with regard to escrow, settlement, or closing services.” IOWA CODE § 16.93(5). *See also* Strickler, *supra*, at 390 (“Currently, about two thousand attorneys in [Iowa] participate in the Title Guaranty Program”).

Also, pursuant to IOWA CODE § 16.91(2):

A title guaranty, closing protection letter, or gap coverage issued under this [Title Guaranty] program is an obligation of the division only and claims are payable solely and only out of the moneys, assets, and revenues of the title guaranty fund and are not an indebtedness or liability of the state. The state is not liable on any guaranty, closing protection letter, or gap coverage.

7) **Louisiana.** In Louisiana, LA. R.S. 22:2092.5 states, in pertinent part, that:

C. (1) Notwithstanding Subsection A of this Section, a title insurer may issue closing or settlement protection to a person who is a party to a transaction in which a title insurance policy is contemplated to be issued. The closing or settlement protection shall conform to the terms of coverage and form of instrument as may be required by the department and may indemnify a person solely against loss of settlement funds because of the following acts of a settlement agent, title insurer's named employee, or title insurance agent:

(a) Theft or misappropriation of settlement funds.

- (b) Failure to comply with instructions agreed to by the settlement agent, employee, or title insurance agent.
- (2) The premium charged by a title insurer for this coverage shall be submitted to and approved by the Louisiana Insurance Rating Commission.
- (3) A title insurer shall not provide any other coverage which purports to indemnify against improper acts or omissions of a person with regard to escrow or settlement services.

Title insurers in Louisiana charge a \$25.00 fee (which is considered a “premium”) for the protection offered by a CPL (but not for the issuance of the letter).

8) **Nebraska.** A Nebraska statute, R.R.S. NEB. § 44-1984(2) (a)-(c), expressly authorizes a title insurer to issue a CPL upon request, in connection with the issuance of a title commitment or policy. This statute states that the title insurer may indemnify the proposed insured solely against the loss of settlement funds because of the agent’s theft of such funds and failure to comply with written closing instructions when agreed to by the agent relating to title insurance coverage. The statute prohibits “any other coverage which purports to indemnify against improper acts or omissions of a person with regard to escrow, settlement, or closing services.” *Id.* § 44-1984(2)(c).

9) **New Mexico.** In New Mexico there is an administratively promulgated form of CPL, which is among a group of standard forms that must be used by title companies and their authorized agents when insuring interests in New Mexico property. *See* § 13.14.18.21 NMAC. *See also* § 13.14.1.7 NMAC, which states, at subsection D.(2), that:

It is prohibited for title insurance agents, title insurers or third party fiduciaries to guaranty the collectability of funds or indemnify their financial institutions from loss due to uncollected funds. This prohibition shall not affect the authority of title insurers to issue Closing Protection Letters as authorized under the rules and regulations promulgated by the Superintendent of Insurance; nor the ability of title insurance agents, title insurers, or third party fiduciaries to endorse without qualification, restriction or limitation, checks, drafts, or other similar items for deposit into its account at any financial institution.

10) **Ohio.** In Ohio, O.R.C. § 3953.32, enacted in 2007, requires (at § 3953.32(A)) the title insurance company or the title insurance agent, “at the time an order is placed with a title insurance company for issuance of a title insurance policy,” to “offer closing protection to the lender, borrower, and seller of the property, and to any applicant for title insurance.” In addition, §§ 3953.32(B)-(D) state that:

(B) The closing or settlement protection offered pursuant to this section shall indemnify any lender, borrower, seller, and applicant that has requested the protection, both individually and collectively, against the loss of settlement funds resulting from any of the following acts of the title insurance company's named title insurance agent or anyone acting on the agent's behalf:

(1) Theft, misappropriation, fraud, or any other failure to properly disburse settlement, closing, or escrow funds.

(2) Failure to comply with any applicable written closing instructions, when agreed to by the title insurance agent.

(C) The issuance of closing or settlement protection by a title insurance company pursuant to division (A) of this section is part of the business of title insurance for purposes of Chapter 3953 of the Revised Code.

(D) Except as provided in division (A) of this section, a title insurance company shall not offer or issue any coverage purporting to indemnify against a person's improper acts or omissions in connection with escrow, settlement, or closing services.

The revised form of closing protection letter submitted by the Ohio Title Insurance Rating Bureau, and accepted and approved by the Ohio Department of Insurance on May 1, 2008, reads as follows:

Form CP-24

BLANK TITLE INSURANCE COMPANY

Date: \_\_\_\_\_

[Check each party to be covered and insert the name of each said party.]

Covered Parties:

Seller	<input type="checkbox"/>	_____
Buyer	<input type="checkbox"/>	_____
Borrower	<input type="checkbox"/>	_____
Lender	<input type="checkbox"/>	_____

Re: Closing Protection Coverage ("CPC")  
Licensed Agent:  
Premises:  
Commitment Reference No. \_\_\_\_\_

Dear Customer:

When title insurance is specified in connection with closing of the above-described real estate transaction (the "Closing") in which Closing you are the Covered Party hereunder with an interest in land or a lender secured by a mortgage (including any other security instrument) of an interest in land, Blank Title Insurance Company (the "Company"), subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with the Closing, when such Closing is conducted by the above named Licensed Agent (an agent licensed and authorized to issue title insurance in the State of Ohio for the Company) and where such loss arises out of:

1. Theft, misappropriation, fraud or any other failure of the Licensed Agent, or anyone acting on the Licensed Agent's behalf, to properly handle and disburse your funds or documents in connection with such Closing; or
2. Failure of the Licensed Agent, or anyone acting on the Licensed Agent's behalf, to comply with any applicable written closing instructions, when agreed to by the Licensed Agent, to the extent that they relate to: (a) the status of the title to said interest in land or the marketability thereof as insured or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursements of funds necessary to establish such status of title or lien; or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain such other document affects the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document.

CP-24  
(05/01/2008)

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Conditions and Exclusions:

A. The Company will not be liable to you for loss arising out of:

1. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Licensed Agent to comply with your written closing instructions to deposit the funds in a bank which you designate by name.
2. Mechanics' and materialmen's liens in connection with your purchase or lease or construction loan transactions, except to the extent that protection against such liens is afforded by a title insurance binder, commitment or policy.
3. Matters created, suffered, assumed or agreed to by you and/or your agents or employees.

B. Should the Company reimburse you pursuant to this CPC, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.

C. Any liability of the Company for loss incurred by you in connection with the Closing by a Licensed Agent shall be limited to the protection provided by this CPC. However, this CPC shall not affect nor be deemed to be a substitute for the protection afforded by a title insurance binder, commitment or policy.

D. Liability under this CPC to a covered party is limited to actual loss of funds and shall in no event be greater than the amount of funds due to, or paid, for the benefit of the covered party in connection with the Closing.

E. Claims shall be made promptly to the Company at its office at \_\_\_\_\_. When the failure to give prompt notice shall prejudice the Company, then liability of the Company hereunder shall be reduced to the extent of such prejudice.

F. The Company shall not be liable hereunder unless notice of claim in writing is received by the Company within one year from the date of the Closing.

G. The scope and effect of this CPC is limited to a single transaction, which is the Closing on the commitment or binder referenced in the caption.

H. This CPC supersedes any previously issued closing protection letter(s) or CPC.

BLANK TITLE INSURANCE COMPANY

By:\_\_\_\_\_

11) **Texas.** In Texas, TEX. INS. CODE art. 9.49, which governs the issuance of “closing and settlement letters” by title insurance companies, was repealed by STATS. 2003, ch. 1274, effective April 1, 2005. New sec. 2702.001 provides that title insurance companies may, upon request, issue insured closing and settlement letters -- at no charge -- in connection with the closing and settlement by a title insurance agent or direct operation of a title insurance company of loans relating to property located in the state. This new section also provides that insured closing and protection letters must be in the form prescribed by the commissioner of the Texas Department of Insurance, by a title insurance agent or direct operation for any title insurance company. Only the form prescribed by the commissioner may be used in issuing such insured closing and

settlement letters. New sec. 2702.002 provides that title insurance companies also may, upon request, issue insured closing and settlement letters -- at no charge -- to the buyer or seller of real property in connection with the closing and settlement of a transaction by a title insurance agent or direct operation of a title insurance company relating to property located in the state. Such an insured closing and settlement letter must be issued to the buyer or seller at or before closing and must be in the form and manner prescribed by the commissioner. Under new sec. 2702.003, the liability of the title insurance company under a policy of title insurance is not affected by the failure of the title insurance company to issue an insured closing and settlement letter.

The Texas Department of Insurance, which promulgates rates, rules and forms pertaining to title insurance, has issued a procedural rule (Rule P-35) (“Prohibition Against Guaranties, Affirmations, Indemnifications, and Certifications”), which states that:

No Title Insurance Company, Title Insurance Agent, Direct Operation, Escrow Officer, nor any employee, officer, director or agent of any such entity or person, shall issue or deliver any form of verbal or written guaranty, affirmation, indemnification, or certification of any fact, insurance coverage or conclusion of law to any insured or party to a transaction other than: (i) a statement that a transaction has closed and/or has been funded, (ii) issuance of an insurance closing service letter, or any insuring form or endorsement promulgated by the State Board of Insurance, or (iii) certification of copies of documents as being true and exact copies of the original document or of the document recorded in the public records.

12) **Utah.** In Utah, a title insurance company that is represented by an agent is directly and primarily liable to others dealing with the agent for the receipt and disbursement of funds deposited in escrows, closings, or settlements, but the liability does not modify, mitigate, affect, or impair the contractual obligations between the title agent and the company. *See* UTAH CODE ANN. § 31A-23-308.

#### B. Regulatory and Administrative Restrictions or Prohibitions.

Most states encourage (or at least take no adverse position with respect to) the issuance of CPLs. For example, in 1989 the Kansas Commissioner of Insurance issued Bulletin No. 1989-30, which stated that “closing protection letters are not to be issued by title insurers in Kansas because they constitute surety or fidelity coverage.” On June 4, 1996, the Kansas Commissioner issued Bulletin No. 1996-6, which rescinded Bulletin No. 1989-30 and stated that, “*Ford v. Guaranty Abstract and Title Co.*, 220 Kan. 244, holds that failure to use due care in the process of disbursing funds by a real estate conveyor is negligence. Therefore, it is inappropriate to continue Bulletin 1989-30 in force because the case law suggests the exposure covered by closing protection letters is negligence liability rather than surety or fidelity coverage.” Bulletin 1996-6 further states that, “title insurance companies may issue closing protection letters at their option. Allowing such closing protection letters to be issued will benefit real estate purchasers

and sellers, as well as title insurers, title companies, real estate agents, mortgage companies, and others who act as real estate conveyancers and disburse funds.”

1) **New Jersey.** In some states, however, regulatory restrictions or prohibitions apply with respect to the issuance of CPLs. For example, the promulgated form of New Jersey (which is a regulated state) CPL, approved for use effective June 1, 2004, is the only form that may be used in that state. This approved form of letter differs in a number of respects from the 1987 ALTA CPL. It eliminates the coverage provided in 1.(b) on top of the first page of the 1987 ALTA CPL, i.e., “the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document.” It also modifies the coverage the coverage provided in 2. on the top of the first page of the 1987 ALTA CPL by limiting coverage for fraud or dishonesty of the Issuing Agent or Approved Attorney in handling the lender’s funds (but not its documents) to the failure to comply with the lender’s closing instructions to the extent they relate to title to the interest insured or the validity, enforceability of the lien of the lender’s insured mortgage (including the obtaining of documents and disbursement of funds necessary to establish such title or lien, or the collection and payment of funds due the lender. There is a mandatory \$25.00 fee for every CPL issued in connection with a New Jersey transaction.

2) **New York.** The State of New York Insurance Department prohibits CPLs, having stated in 1992 that a CPL “is in the nature of fidelity or surety coverage, or resembles professional liability insurance against malpractice.” *See* Circular Letter No. 18 (1992) (“NY Circular Letter”) by Hon. Salvatore R. Curiale, Superintendent of Insurance of the State of New York (Dec. 14, 1992). As a rule, according to the NY Circular Letter, title insurers lack authority to issue a CPL to a lender insofar as that lender’s attorney is concerned, because its purported protection falls beyond the scope of the monoline title insurer’s license and writing authority that is exclusively confined to Section 1113(a)(18) of the Insurance Law. The NY Circular Letter further provides, however, that title insurers are not precluded from issuing an appropriate agent authorization letter, confined to the title insurer’s liability as principal for the acts of the agent within the scope of that agent’s authority on the title insurer’s behalf. These letters are frequently issued, and contain language similar to the following:

Please be advised that \_\_\_\_\_ is a duly constituted and authorized agent of \_\_\_\_\_ Title Insurance Company. As such agent, said Company can act fully on our behalf and in our stead and has the authority to prepare and issue Certificate and Report of Titles, omit title exceptions, collect title insurance premiums and issue Title Insurance Policies and endorsements thereto.

On December 28, 2005, the Office of General Counsel of the State of New York issued an opinion letter on the “Issuance of Closing Protection Letter,” representing the position of the New York State Insurance Department (“2005 Opinion Letter”). The 2005 Opinion Letter referred to the NY Circular Letter, *supra*, and noted that while (as noted above) title insurance companies lack authority to issue a CPL to a lender, they are not precluded from issuing an appropriate agent authorization letter (containing language similar to that set forth above) that is

confined to the title insurance company's liability as principal for the acts of its agent within the scope of that agent's authority on the title company's behalf. But the 2005 Opinion Letter states that "[t]he protection afforded by closing protection letters should be limited to the title insurance policy itself," and further states that "[a] closing protection letter that offers coverage that goes beyond a title agent's duties would be prohibited." *Id.* at Page 2. It thus seems clear that in the State of New York the title underwriter is not a surety for agent in its handling of funds (which, of course, is the primary if not the sole reason that CPLs are requested in other jurisdictions). But some title insurers in the State of New York (especially those located in New York City) have their own escrow agency departments that can escrow, administer and disburse the funds upon request of the lender (with a separate charge for doing so, based on the size and complexity of the particular transaction).

3) **North Carolina.** Effective October 1, 2003, the North Carolina Department of Insurance approved changes filed by the North Carolina Title Insurance Rating Bureau regarding the form, procedure and cost of obtaining CPLs for North Carolina closings. The changes omit paragraph 1.(c) at the top of the first page of the ALTA CPL, limit the language in 2. on the top of the first page of the 1987 ALTA CPL "to the extent such fraud or dishonesty relates to the status of the title to said interest in land or to the validity, enforceability and priority of the lien of said mortgage on said interest in land," and add language at the end of E. on the second page of the 1987 ALTA CPL requiring that the company receive notice of a claim within three years from the date of closing (to comply with the applicable North Carolina statute of limitations). The North Carolina Department of Insurance justifies these changes on the basis that modern real estate closings have become increasingly complex, with increased risk of errors and losses (especially closing protection losses), and that closing-protection liability claims have escalated to an alarming extent and become a major cause of losses for title companies. The changes also mandate that there be one "undivided" charge for title-insurance premiums and closing services, at a charge of 50 cents per thousand from \$0.00 to \$100,000 and \$.10 per thousand from \$100,001.00 to \$500,000.00.

4) **Pennsylvania.** In Pennsylvania, sec. 7.5 of the Pennsylvania Manual of Rates and Forms applicable to title insurance companies, as promulgated by the Pennsylvania Department of Insurance, requires that a specific form of "closing service letter" be issued to a lender (and only to a lender) that requests a CPL in connection with a specific transaction. (The coverage provided under the letter is limited to a single transaction and does not apply to all transactions involving a given lender and a particular approved Issuing Agent or Approved Attorney.) The closing service letter is strictly regulated as to both form and charge; there is a non-waivable \$35 fee for all CPLs, which fee must be remitted in its entirety to the title insurer and not to the Issuing Agent or Approved Attorney. The approved form of closing service letter differs from the 1987 ALTA CPL in that it: (1) eliminates the coverage provided in 1.(b) at the top of the first page of the 1987 ALTA CPL, i.e., "the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document"; (2) modifies the coverage provided in 2. on the top of the first page of the 1987 ALTA CPL by limiting coverage for fraud or "misapplication" (instead of "dishonesty") of the Issuing Agent or Approved Attorney in handling the lender's funds (but not its documents) to the failure to comply with the lender's closing instructions to the extent they relate to title to the interest insured or the validity,

enforceability of the lien of the lender's insured mortgage (including the obtaining of documents and disbursement of funds necessary to establish such title or lien); (3) provides that liability under the letter is limited to the amount of the policy to be issued, and that any payment of loss under the letter constitutes a payment under the policy; (4) states that the title insurance company shall not be liable unless it receives notice of a claim in writing within one year from the date of the closing; and (5) states that the letter does not appoint the Approved Attorney, if any, as an agent of the title insurance company .

5) **Vermont.** In Vermont, there is a promulgated form of CPL. The letter provides coverage for loss by the lender a result of the failure of the Issuing Agent or Approved Attorney to comply with the lender's written closing instructions "prior to the closing to the extent that they relate to the particular transaction," with respect only to the status of title or the validity, enforceability and priority of the mortgage lien or "the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain such other documents affects the status of the title of said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land." It eliminates the coverage provided in 1.(c) on the top of the first page of the 1987 ALTA CPL, i.e., "the collection and payment of funds due you." Also, it protects against fraud and dishonesty of the Issuing Agent or Approved Attorney in handling funds or documents only "to the extent such fraud or dishonesty relates to the status of the title and to said interest in land or to the validity, enforceability and priority of the lien of said mortgage on said interest in land."

6) **Virginia.** In 1995, the Virginia State Corporation Commission Bureau of Insurance issued the Virginia CPL Letter (see Sec. II. Above), an administrative letter stating that CPLs may not be used to indemnify lenders for losses that are unrelated to the condition of title to the property or the status of any lien on the property. *See Admin. Ltr. 1995-8* by Hon. Steven T. Foster, Commissioner of Insurance of the Commonwealth of Virginia, to All Companies Licensed to Write Title Insurance in Virginia (Sept. 4, 1995). The Virginia CPL Letter states that "[b]y statute, title insurers [in Virginia] are monoline insurance companies. Section 38.2-135 prohibits insurers licensed to write title insurance from obtaining a license to any other lines of insurance." The Virginia CPL Letter further states that CPLs therefore must "limit coverage to matters affecting the condition of the title to property or the status of any lien on property." Title companies in Virginia have developed a form of CPL that meets with the Insurance Commissioner's guidelines as provided in the Virginia CPL Letter. While not required, the Virginia CPL Letter is the only form that the Bureau has approved as complying with Virginia Law. (In addition, Virginia requires, pursuant to certain provisions of the Virginia Consumer Real Estate Settlement Protection Act, VA. CODE ANN. §§ 6.1-2.19 to 6.1-2.29, that all settlement agents be licensed and maintain fidelity bonds, and provides for periodic audits of their escrow accounts.)

## V. Fiduciary Duty of "Co-Principals"

When two competing title insurance underwriters sell title insurance through an agent who represents each of them under separate written agency agreements and who also conducts its own

escrow closing services for lenders, sellers and purchasers with respect to real estate transactions, does either of the underwriters owe a duty to the other to disclose any facts, knowledge or information of which it becomes aware that would put it on notice that the agent may have been, or is currently, engaging in illegal or tortious activities that would adversely affect the other underwriter? What if the agent's funds are commingled and funds are used to pay the customers of one title underwriter but not the other during the period of time when the agent has wrongfully misappropriated funds? Would a "conversion" action lie against the title company that allegedly knew of the agent's dishonesty? Should the title underwriter that was allegedly wronged and has paid claims to escrow beneficiaries based on its CPLs have the right to become subrogated to the claims of such escrow beneficiaries, and does the title underwriter who allegedly knew of the agent's wrongdoing have a duty to such beneficiaries? Would such an action lie even if the underwriter who discovered the agent's defalcation had previously terminated the agency relationship upon learning of irregularities in the agent's handling the underwriter's funds? Would these facts support a claim for "civil conspiracy" or "conspiracy to defraud"? Should punitive damages be awarded if such an action is successful? Do title underwriters owe a fiduciary duty to each other in such a situation? Can a claim of "unjust enrichment" or "equitable indemnity" be made against the title insurer whose customers were paid in full from commingled escrow funds? Would such facts support a claim of "racketeering" under the RICO statute (18 U.S.C. sec. 1961 *et seq.*)?

Many of these questions were answered by the court in *TRW Title Ins. Co. v. Security Union Title Ins. Co.*, 1994 U.S. Dist. LEXIS 6373 (N.D. Ill. May 13, 1994). In this case, the court refused to dismiss a claim of breach of fiduciary duty owed by one title insurer to another when dealing with a common agent who misappropriated escrow funds. The court, in issuing its ruling, relied in part on the right to subrogation of the title company that paid claims to lenders who were beneficiaries, under CPLs, of escrow accounts maintained by the agent and who would have had claims against the agent as well as the other title insurer who allegedly knew of, and illegally benefited as a result of, the agent's wrongdoing. Based on the *Sears* and *Clients' Security Fund* cases, *supra*, the court recognized a fiduciary duty arising on the part of title insurers by virtue of a "co-principal" agency relationship. *See also Zabrecky v. American Title Ins. Co.*, 1994 U.S. Dist. LEXIS 11106 (E.D. Pa. Aug. 8, 1994), at \*14 ("Whether or not an agency relationship existed . . . depends on the particular facts and circumstances of the relationship between the purported principal and agent and may be established by the conduct of the parties"); *Fidelity Nat'l Title Ins. Co. v. Howard Sav. Bank*, 2003 U.S. Dist. LEXIS 25933 (D. Ill. Feb. 11, 2003) at \*12 ("As [a title insurance agent], Old Intercounty was a trustee of the escrow funds that it managed and not only owed fiduciary obligations to the parties to the real estate transactions, but was obligated to make specific disbursements of the funds" (citing *TRW Title Ins. Co. v. Security Union Title Ins. Co.*, *supra*)); *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 2002 U.S. Dist. LEXIS 17002 (D. Ill. July 8 2002), at \*23 (holding that use of escrow funds for improper purposes can constitute breach of fiduciary duty).

## VI. Bibliography

For further discussion and analysis of the legal issues involved in agency relationships maintained by title insurers, and the use of CPLs in general, see John L. Hosack, *Techniques for the Reduction of Risk When Dealing With a Title Agent*, 2003 ICSC Ohio, Kentucky and Indiana Retail Development Law Symposium (Independence, Ohio, June 20, 2003); John L. Hosack and Peter K. Rindle, *Fraud and Forgery Claims: An Epidemic*, presentation to Title Insurance Litigation Committee, Tort and Insurance Practice Section, American Bar Association, Regional Continuing Legal Education Seminar, Beverly Hills, California, September 29, 1995; Joyce D. Palomar, *Limited Liability Companies, Corporations, General Partnerships, Limited Partnerships, Joint Ventures, Trusts – Who Does the Title Insurance Cover?*, 31 REAL PROP. PROB. & TR. J. 605, 645 (1997); John C. Murray, *Insured Closings: Title Company Agents and Approved Attorneys*, 29 PLI/Real 1161 (2000); James Bruce Davis, *Are Closing Protection Letters Insurance?* ABA TORT & INS. PRACTICE SECTION, TITLE INSURANCE LITIGATION COMMITTEE NEWSLETTER (Summer 2000); J. Bushnell Nielsen, TITLE & ESCROW CLAIMS GUIDE (1996) § 14 (Foundation Press 1996 and Cum. Supp. 2000); Raymond J. Werner, *Title Insurance in Troubled Times: What You Need to Know*, 375 PLI/Real 39 (1988); Oscar H. Beasley, *Title Insurance 1989: Negotiating Additional Coverage, Exclusions from Coverage*, 331 PLI/Real 23 (1989); James Bruce Davis, *The Law of Closing Protection Letters*, 36 TORT & INS. L. J. 845 (Spring 2001); Barlow Burke, LAW OF TITLE INSURANCE, § 13.10 (3d ed. 2000); Oscar H. Beasley, *Escrows and Closings*, TITLE INSURANCE 1994 (1994); Shawn G. Rader, *Real Property, Probate and Trust Law: Closing Protection Letters*, 70 FLA. BAR. J. 38 (1996); Joyce D. Palomar, *Title Insurer's Liability for Escrow and Closing Services*, LAW OF DISTRESSED REAL ESTATE, Ch. 42 § 42:52 (2006); Joyce D. Palomar, *Title Insurance Underwriter's Liability for Agents' Escrows and Closings – Measure of Loss Under Closing Protection Letters*, 2 TITLE INS. LAW § 20:14 (2007).

## VII. Conclusion

The CPL serves to extend the liability of the (presumably) large and creditworthy title insurance company - which would otherwise be limited to the title insurance policy - to cover certain “bad acts” of the company’s Issuing Agent or Approved Attorney. But this additional protection must be separately and specifically requested from the title insurer, and the scope of the coverage is defined solely by the terms and provisions of the letter. Coverage under the CPL is also strictly limited to the parties designated therein, and generally applies only with respect to the particular transaction for which the letter is furnished. The ALTA has attempted to meet the needs of title insurance customers by expanding the types of CPLs (the latest being the 2008 ALTA CPLs) to cover varying factual situations and comply with state statutory and regulatory restrictions. It is important for both the insured and the insurer to understand the legal (both case law and statutory) and regulatory restrictions and limitations on the use of CPLs in certain jurisdictions, and the nature and scope of the agency relationships that exist between title insurance companies and their Issuing Agents and Approved Attorneys. Recently, some title insurers have been pressured to issue CPLs to parties other than Issuing Agents and Approved Attorneys, such as independent escrow or settlement-service companies, real estate brokers, and loan originators in securitized and conduit transactions. It is likely that title companies will strongly resist such efforts because of the very real risk of incurring liability without

accountability and supervision, and because of the additional risk of providing unauthorized fidelity or surety coverage.

**EXHIBIT "A"**

**INSURED CLOSING LETTER (ALTA FORM, 1987)**

\_\_\_\_\_ TITLE INSURANCE COMPANY

Name and Address of Addressee: \_\_\_\_\_ Date: \_\_\_\_\_

Re: Closing Protection Letter

Dear \_\_\_\_\_:

When title insurance of \_\_\_\_\_ Insurance Company (the "Company") is specified for your protection in connection with closings of real estate transactions in which you are to be the lessee or purchaser of an interest in land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by an Issuing Agent (an agent authorized to issue title insurance for the Company) or an Approved Attorney (an attorney upon whose certification of title the Company issues title insurance) and when such loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
2. Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closings.

If you are a lender protected under the foregoing paragraph, your borrower in connection with a loan secured by a mortgage on a one to four family dwelling shall be protected as if this letter were addressed to your borrower.

Conditions and Exclusions

- A. The Company will not be liable to you for loss arising out of:

**EXHIBIT "A" (CONTINUED)**

1. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in said binder or commitment shall not be deemed to be inconsistent.
2. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
3. Mechanics' and materialmen's liens in connection with your purchase or lease or construction loan transactions, except to the extent that protection against such liens is afforded by a title insurance binder, commitment or policy of the Company.

B. If the closing is to be conducted by an Issuing Agent or Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Issuing Agent or Approved Attorney.

C. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.

D. Any liability of the Company for loss incurred by you in connection with closings of real estate transactions by an Issuing Agent or Approved Attorney shall be limited to the protection provided by this letter. However, this letter shall not affect the protection afforded by a title insurance binder, commitment or policy of the Company.

E. Claims shall be made promptly to the Company at its principal office at \_\_\_\_\_, Attention: \_\_\_\_\_. When the failure to give prompt notice shall prejudice the Company, then liability of the Company hereunder shall be reduced to the extent of such prejudice.

F. The protection herein offered does not extend to real property transactions in \_\_\_\_\_.

**EXHIBIT "A" (CONTINUED)**

The protection herein offered will be effective upon receipt by the Company of your acceptance in writing, which may be made on the enclosed copy hereof and will continue until cancelled by written notice from the Company.

Any previous insured closing service letter or similar agreement is hereby cancelled except as to closings of your real estate transactions regarding which you have previously sent or within 30 days hereafter send written closing instructions to the Issuing Agent or Approved Attorney.

\_\_\_\_\_ TITLE INSURANCE COMPANY

BY: \_\_\_\_\_

\_\_\_\_\_  
(Title)

Accepted: \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_

(Title)

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent)

## EXHIBIT "A-1"

### ALTA CLOSING PROTECTION LETTER - A REVISED EXPLANATION

As title insurance companies spread across the country, they transacted business through issuing agents as well as through their branch offices. Where they did not have title examination facilities in their offices or agencies, they relied on so-called "approved attorneys" for title evidence.

In approaching their customers - especially national customers - for business, title insurers asked that the orders for policies be sent not only to their branches, but also to issuing agents or through approved attorneys.

These issuing agents and approved attorneys furnished loan closing services and it was suggested that the national lender or purchaser not only get title insurance from the locality, but escrow closing service as well, from the issuing agent or approved attorney.

Customers naturally raised the question as to what liability, if any, the title insurer might have outside of its policy, for loss suffered due to the issuing agent's or approved attorney's mishandling of the funds in closing the transaction.

It was evident that the approved attorney was not appointed by the title company as its agent for any purpose but was merely approved as being an acceptable source of a title opinion on which the insurer would rely for issuance of its policies. The issuing agent was expressly authorized by contract to act only as agent for issuing title policies. Therefore, it became apparent that neither closing media has *express* authority to handle closings as an agent of the title insurer with the resulting liability for negligence or fraud.

The doctrine of apparent authority was not very helpful either, since that legal precept depended on the lender or purchaser being able to prove that he had justifiably relied on the conduct of the title insurer to mislead him into thinking that the issuing agent or approved attorney was closing the transaction as an agent of the title company. This made the liability of the title insurer for such closings uncertain since each case turned on the facts and the law as applied in different jurisdictions.

For these reasons, investors in real estate asked for definite undertakings from title insurers setting forth in writing the extent of their responsibility for errors in closing on the part of their issuing agents and approved attorneys. The title companies responded with numerous forms of closing protection letters furnishing coverage in different degrees. The result is that a national lender, for example, has received closing indemnities differing in protection not only from insurer to insurer, but from state to state or from time to time as issued by the same insurer.

## EXHIBIT "A-1" (CONTINUED)

The Executive Committee of the American Land Title Association decided it would be helpful to promulgate an association form which would provide a carefully drafted statement, which, on due consideration, might be acceptable to insurer and insured.

The opening paragraph of the ALTA Closing Protection Letter furnishes protection to purchasers, lessees and lenders when closings are conducted by the title company's issuing agents or approved attorneys.

Under Paragraph 1, the protection is against loss or damage arising from failure to follow the addressee's *written* closing instructions. The failure may relate first to instructions dealing with the status of the title to the land or the lien of the mortgage. This item includes the obtaining of documents necessary to establish such status of title or lien.

Secondly, the instructions covered may also relate to the obtaining of any other documents, even though they do not relate to status of title or lien, but not to instructions requiring the issuing agent or approved attorney to determine whether these other documents are necessary or whether they are properly drafted. In other words, under Item 1.(b), instructions to obtain a certain type or form of non-title document are covered, but instructions to ascertain that a non-title document is valid, enforceable or effective are not covered.

Thirdly, instructions which relate to the collections and payment of funds due the addressee are covered, regardless of the type of funds or from where they are to be collected.

In an effort to provide protection to the homeowner, the letter, when addressed to a lender, will be deemed to have been addressed to its residential borrower, thus covering the homeowner as if he had the letter.

Paragraph 2 protects against dishonesty in handling the addressee's funds or documents. Any fraudulent use of money or of documents belonging to the addressee would be covered.

Item A.1 of the Conditions and Exclusions excludes liability when the addressee, after insurance of a binder or commitment, issues instructions to an approved attorney requiring title insurance coverage different from the coverage committed for in the binder or commitment. The approved attorneys, unlike issuing agents, may not be knowledgeable regarding title insurance underwriting and should not be in a position to, in effect, commit for additional coverage by closing the transaction. The title insurer should be requested to amend the binder or commitment prior to closing. However, instructions relating to removal of specific exceptions or compliance with requirements are covered.

Under Item A.2 the title insurer is not liable for bank failures unless the closing funds are deposited in a bank different from the bank specified by name.

## **EXHIBIT “A-1” (CONTINUED)**

Item A.3 makes it clear that if the title insurer does not have liability for mechanics' liens in its title insurance documents, then it does not incur such liability in the Closing Protection Letter.

Paragraph B conditions the coverage on the addressee having received a commitment or binder before he permits an approved attorney to close the transaction. This ties in with Item A.1 and permits the lender or purchaser to know what title insurance coverage he can obtain before he authorizes the attorney to disburse his funds.

Item C., D. and E. are standard indemnity contract provisions and are self-explanatory. Paragraph F. makes the letter inapplicable to states as indicated by the Company.

The protection furnished by the letter becomes effective when the addressee signs and returns the letter. It can be cancelled only by written notice.

The last paragraph cancels previous letters except as to instructions already sent or sent within 30 days.

If the customer requires a Closing Protection Letter regarding a particular issuing agent or approved attorney, the name may be inserted in the letter in place of the general reference.

**EXHIBIT “B”**

**ALTA CLOSING PROTECTION LETTER**

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

Name and Address of Addressee:

Date:

Name of Issuing Agent or Approved Attorney (hereafter, “Issuing Agent” or “Approved Attorney”, as the case may require):

*[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Re: Closing Protection Letter

Dear

\_\_\_\_\_ Title Insurance Company (the “Company”) agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with closings of real estate transactions conducted by the Issuing Agent or Approved Attorney, provided:

- (D) title insurance of the Company is specified for your protection in connection with the closing; and
- (E) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closings to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

## **EXHIBIT "B" (CONTINUED)**

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

### Conditions and Exclusions

1. The Company will not be liable to you for loss arising out of:
  - A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.
  - B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
  - C. Defects, liens, encumbrances or other matters in connection with your purchase, lease or loan transactions except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.
  - D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.
  - E. Your settlement or release of any claim without the written consent of the Company.
  - F. Any matters created, suffered, assumed or agreed to by you or known to you.
2. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.
3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.
4. The Issuing Agent or Approved Attorney is the Company's agent only for the limited purpose of issuing title insurance policies, and is not the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction.

**EXHIBIT "B" (CONTINUED)**

However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.

5. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.
6. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_ . The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.
7. The protection herein offered extends only to real property transactions in [State].

Any previous closing protection letter or similar agreement is hereby cancelled, except for closings of your real estate transactions for which you have previously sent (or within 30 days hereafter send) written closing instructions to the Issuing Agent or Approved Attorney.

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

**By:** \_\_\_\_\_

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent.)

**EXHIBIT “C”**

**ALTA CLOSING PROTECTION LETTER – LIMITATIONS**

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

Name and Address of Addressee:

Date:

Name of Issuing Agent or Approved Attorney (hereafter, “Issuing Agent” or “Approved Attorney”, as the case may require):

*[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Re: Closing Protection Letter

Dear

\_\_\_\_\_ Title Insurance Company (the “Company”) agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with closings of real estate transactions conducted by the Issuing Agent or Approved Attorney, provided:

(F) title insurance of the Company is specified for your protection in connection with the closing; and

(G) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closings to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

## EXHIBIT "C" (CONTINUED)

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

### Conditions and Exclusions

1. The Company will not be liable to you for loss arising out of:
  - A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.
  - B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
  - C. Defects, liens, encumbrances or other matters in connection with your purchase, lease or loan transactions except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.
  - D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.
  - E. Your settlement or release of any claim without the written consent of the Company.
  - F. Any matters created, suffered, assumed or agreed to by you or known to you.
2. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.
3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed; Liability of the Company for reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.
4. The protection herein offered shall not extend to any transaction in which the funds you transmit to the Issuing Agent or Approved Attorney exceed \$\_\_\_\_\_. The Company shall have no liability of any kind for the actions or omissions of the Issuing Agent or Approved Attorney in that transaction except as may be derived under the Company's commitment for title insurance, policy of title insurance or other express written agreement. Please contact the Company if you desire the protections of this letter to apply to that transaction. This paragraph shall not apply to individual mortgage loan transactions on individual one-to-four-family residential properties (including residential townhouse, condominium and cooperative apartment units).

**EXHIBIT "C" (CONTINUED)**

5. The Issuing Agent or Approved Attorney is the Company's agent only for the limited purpose of issuing title insurance policies, and is not the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.
6. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.
7. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_ . The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.
8. The protection herein offered extends only to real property transactions in [State].

Any previous closing protection letter or similar agreement is hereby cancelled, except for closings of your real estate transactions for which you have previously sent (or within 30 days hereafter send) written closing instructions to the Issuing Agent or Approved Attorney.

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

**By:** \_\_\_\_\_

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent.)

**EXHIBIT “D”**

**CLOSING PROTECTION LETTER - SINGLE TRANSACTION LIMITED LIABILITY**

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

Name and Address of Addressee:

Date:

Name of Issuing Agent or Approved Attorney (hereafter, “Issuing Agent” or “Approved Attorney”, as the case may require):

*[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Transaction (hereafter, “the Real Estate Transaction”):

Re: Closing Protection Letter

Dear

\_\_\_\_\_ Title Insurance Company (the “Company”) agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney, provided:

- (H) title insurance of the Company is specified for your protection in connection with the closing of the Real Estate Transaction;
- (I) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land; and
- (J) the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed \$ \_\_\_\_\_

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or

## EXHIBIT "D" (CONTINUED)

2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closing to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

### Conditions and Exclusions

1. The Company will not be liable to you for loss arising out of:
  - A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.
  - B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
  - C. Defects, liens, encumbrances or other matters in connection with the Real Estate Transaction if it is a purchase, lease or loan transaction except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.
  - D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.
  - E. Your settlement or release of any claim without the written consent of the Company.
  - F. Any matters created, suffered, assumed or agreed to by you or known to you.
2. If the closing is conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.
3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.
4. The Issuing Agent or Approved Attorney is the Company's agent only for the limited purpose of issuing title insurance policies, and is not the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the

**EXHIBIT "D" (CONTINUED)**

protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.

5. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than \$2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.
  
6. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_ . The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.

Any previous closing protection letter or similar agreement is hereby cancelled with respect to the Real Estate Transaction.

\_\_\_\_\_ **TITLE INSURANCE COMPANY**

**By:** \_\_\_\_\_

(The words "Underwritten Title Company" maybe inserted in lieu of Issuing Agent)