

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

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## **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." Closing protection letters 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 closing protection letters 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.

## **Closing Protection Letters – What is Covered?**

Closing protection letters 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 closing protection letters 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.

A closing protection letter 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" closing protection letter that protects a particular lender in connection with escrow closing activities and services involving a designated agent for a specified period of time. The closing protection letter 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 closing protection letter 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 closing protection letters, 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").

Closing protection letters 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). Closing protection letters 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 closing protection letter developed by the American Land Title Association ("ALTA") in 1987 is attached hereto as **Exhibit "A"** ("ALTA CPL"). The ALTA's Revised Explanation of the ALTA CPL is attached hereto as **Exhibit "A-1."** The 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 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 ALTA CPL, and most other forms of closing protection letters that are issued by title insurers, offer the same form of protection to borrowers, as well as lenders, in residential transactions - although many borrowers may be unaware of this protection. The ALTA CPL states that, "If you are a lender protected under [the first paragraph of the letter], 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." A nationally approved form of

closing protection letter available from the author's employer (where not otherwise prohibited or modified by applicable state statutes or regulations) is attached hereto as **Exhibit "B."**

On October 17, 1998, the ALTA adopted a number of new forms, including three new forms of closing protection letters: Regulatory (a copy of which is attached hereto as **Exhibit "C"**); Non-Residential Limitations (a copy of which is attached hereto as **Exhibit "D"**); and Single Transaction Limited Liability (a copy of which is attached hereto as **Exhibit "E"**). The Regulatory form is a modification of the standard ALTA closing protection letter, and is designed to comply with the stricter standards for closing protection letters now in force in several states, i.e., in those states that prohibit title companies from insuring anything other than real estate titles. It was adopted for use where the standard form is unacceptable to the state regulatory authorities and agencies that regulate title insurance. The major difference from the ALTA CPL is that the title insurer's agreement to indemnify the lender in connection with the handling of funds or documents by an Issuing Agent or Approved Attorney in connection with the closing is only provided "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." The other two forms are intended to provide lenders, title insurers and title agents with the option to obtain protection tailored for specific types and sizes of transactions. These forms normally will be implemented in non-residential transactions when the amount of funds the lender transmits to an agent or approved attorney is within a specified or agreed-upon limit. The Non-Residential Limitations letter is designed 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 closing protection letter. It expressly excepts individual residential (i.e., one-to-four family) mortgage loan transactions from this limitation. This form may be adopted as either a replacement of, or in addition to, the Regulatory form of ALTA closing protection letter. The related Single Transaction Limited Liability form 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. The title insurer would review the facts and circumstances of the transaction and issue this letter if it agrees to assume the additional risk. This letter expressly states that the title insurer will not provide protection in accordance with the letter if the aggregate funds actually distributed exceed the agreed-upon amount.

## **Legal Issues and Court Decisions**

### **A. Do Closing Protection Letters Constitute Insurance Contracts?**

With respect to the issue of whether closing protection letters 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 closing protection letters, 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 closing protection letter 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 closing protection letters 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 closing protection letter, 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 closing protection letter issued to the mortgage lender and the nature and scope of the agency agreement between title insurer and the agent.

A title company's closing protection letter actually 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 closing protection letter 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 closing protection letter -- 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 closing protection letter, 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 closing protection letter 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. USLife 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 closing protection letter).

The determination of coverage under a closing protection letter 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 closing protection letter. The designated Approved Attorney named in the closing protection letter, 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 closing protection letter. 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 Closing Protection Letter,” 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 closing protection letter, “[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.*

*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.” *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 closing protection letters 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.

With respect to the measure of damages available to a party protected by a closing protection letter, 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 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 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 closing protection letters issued to the lenders, from the bank that maintained the agent's escrow account. The title company routinely issued a closing protection letter, 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 closing protection letter 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 closing protection letter 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 closing protection letter 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 closing protection letter 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).

But in *Cameron County Savings Assn. v. Stewart Title Guaranty Co.*, 819 S.W. 2d 600, 604-05 (Tex. Ct. App. 1991), 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 closing protection letter 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 closing protection letter); *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); *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 closing protection letter issued by title insurer to new mortgagee in connection with mortgagor-buyer's purchase of property).

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

The ALTA CPL (as well as the other forms of ALTA closing protection letters) provide 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 closing protection letters, *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 closing protection letters 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 closing protection letters 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.

#### E. Bibliography

For further discussion and analysis of the legal issues involved in agency relationships maintained by title insurers, and the use of closing protection letters 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); Joyce D. Palomar, TITLE INSURANCE LAW, § 5-12 (1994); 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).

#### **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 closing protection letters 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 closing protection letters, 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).

### **Statutory and Regulatory Restrictions**

Although the ALTA forms of closing protection letters 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 closing protection letters 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 closing protection letters 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 closing protection letters, 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 closing protection letters and does not have a promulgated or filed form of closing protection letter). 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 closing protection letters 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.

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 closing protection letter 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 closing protection letter 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 closing protection letter issued in Arizona is virtually the same as the ALTA CPL except that there are three separate letters for lender, buyer and seller.

Florida authorizes the issuance of closing protection letters, 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 closing protection letters); 690-186.010, F.A.C. 690.010 (setting forth form and content of approved closing protection letter). 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].”

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

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 of “Title Guaranty Certificates.” *See* IOWA CODE § 16.3(15) (2004). *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 closing protection letter 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) (2004):

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). *See also* Strickler, *supra*, at 390 ("Currently, about two thousand attorneys in [Iowa] participate in the Title Guaranty Program").

There is currently a bill in the Iowa legislature, 2005 IA H.S.B. 273, which would authorize the sale of title insurance in Iowa and regulate title insurance agents and title insurers. The proposed legislation includes, as part of a newly created Iowa Code chapter 5151 entitled "Iowa Title Insurers Act," a provision, at sec. 20.3., which states (in pertinent part) as follows:

- a. . . . a title insurer may issue closing or settlement protection to a proposed insured upon request if the title insurer issues a

preliminary report, binder, or title insurance policy to a proposed insured. Such closing or settlement protection shall conform to the terms of coverage and format required by the commissioner and may indemnify a proposed insured only against loss of settlement funds because of the following acts of a title insurer's named title insurance agent:

(1) Theft of settlement funds.

(2) Acquiescence in the failure of a proposed insured to comply with written closing instructions relating to title insurance coverage by title insurance

to comply with written closing instructions relating to title insurance coverage by the title insurance agent.

b. 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, settlement, or closing services.

The ultimate fate of this proposed legislation is uncertain as of the date of this article.

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 closing protection letter (but not for the issuance of the letter).

A Nebraska statute, R.R.S. NEB. § 44-1984(2) (a)-(c), expressly authorizes a title insurer to issue a closing protection letter 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).

In New Mexico there is an administratively promulgated form of closing protection letter, 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.

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.

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 closing protection letters. 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 conveyer 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.”

In some states, however, regulatory restrictions or prohibitions apply with respect to the issuance of closing protection letters. For example, the promulgated form of New Jersey (which is a regulated state) closing protection letter, 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 ALTA CPL. It eliminates the coverage provided in 1.(b) on top of the first page of the 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 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 closing protection letter issued in connection with a New Jersey transaction.

The New York Insurance Department prohibits closing protection letters, having stated in 1992 that a closing protection letter "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 fails 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.

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 closing protection letters 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 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 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.

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 closing protection letter 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 closing protection letters, 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 ALTA CPL in that it: (1) eliminates the coverage provided in 1.(b) at the top of the first page of the 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 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 .

In Vermont, there is a promulgated form of closing protection letter. 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 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.”

In 1995, the Virginia State Corporation Commission Bureau of Insurance issued an administrative letter (“Virginia CPL letter”) stating that closing protection letters 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 closing protection letters 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 closing protection letter 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.)

### **Conclusion**

The closing protection letter 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 closing protection letter 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 closing protection letters 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 closing protection letters 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 closing protection letters 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 issuance 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"**

**CLOSING PROTECTION LETTER - FIRST AMERICAN TITLE INSURANCE  
COMPANY**

\_\_\_\_\_, 200\_\_

Attention:

Re: Closing Protection Letter

When title insurance of First American Title Insurance Company (the "Company") is provided for your protection in connection with closing of real estate transactions in which you are the seller, lessee or purchaser of an interest in land or a lender secured by a mortgage or an assignee of 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 closing, when such closings are conducted by any title office as specified in Exhibit "A" ("Title Agent"), enclosed herewith, and where such loss arises out of:

- A. Failure of the Title Agent to comply with your written closing instructions received by Title Agent prior to closing to the extent that they relate to the particular transaction and apply to:
1. 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 such documents as are necessary to establish such stabs of title or lien; or
  2. 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
  3. the collection and payment of funds due you; or
- B. Fraud or dishonesty of the Title Agent in handling your funds or documents in connection with such closing.

As a lender protected under the foregoing paragraph, your borrower in connection with the loan

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

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:
1. Failure of the Title Agent to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder, preliminary report or commitment issued by the Company. Instructions that require the removal of specific exceptions to title or compliance with the requirements contained in said binder, preliminary report 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 Title Agent to comply with your written closing instructions to deposit the funds in a bank that you designate by name.
  3. Mechanic's 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 commitment, binder, preliminary report or policy of the Company.
- B. If the closing is to be conducted by the Title Agent, a title insurance commitment, preliminary report or binder for the issuance of a policy of title insurance of the Company issued by the Company or any of its Agents must have been received by you prior to the transmission of your final closing instructions to the Title Agent.
- C. When the Company shall reimburse you pursuant to this letter, it shall be subrogated to all rights and remedies that 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 any loss incurred by you in connection with closings of real estate transactions by the Title Agent shall be limited to the protection provided by this letter. However, this letter shall not affect the protection afforded by a title insurance commitment, binder, preliminary report or policy of the Company.
- E. Claims shall be made promptly to the Company at its principal office at 1 First American Way, Santa Ana, California 92707, 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.

**EXHIBIT "B" (CONTINUED)**

- F. Notwithstanding your instructions to the Title Agent, nothing herein shall be construed to impose any liability on the Company on account of any consumer credit protection, truth-in-lending, or similar law, or the provisions of the Flood Disaster Protection Act of 1973.
  
- G. The protection herein offered does not extend to real property transactions in the states of Florida, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Texas, Vermont and Virginia. Insured Closing Letters have been regulated under the laws of those states.

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

FIRST AMERICAN TITLE INSURANCE COMPANY

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

NOTE: for financial statement see: <http://www.firstam.com/faf/ir/annual.htm>

**EXHIBIT “C”**

**ALTA CLOSING PROTECTION LETTER -  
REGULATORY**

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

Name and Address of Addressee:

Date:

Re: Closing Protection Letter

Dear

When title insurance of \_\_\_\_\_ Title Insurance Company (the “Company”) is specified for your protection in connection with closings of [State] 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 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, or
2. Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closings 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.

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.

## EXHIBIT "C" (CONTINUED)

### Conditions and Exclusions

- A. The Company will not be liable to you for loss arising out of:
1. Failure of the 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 such 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.
  4. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent such instructions require a determination by the Issuing Agent or Approved Attorney of the validity enforceability or effectiveness of any document contemplated under paragraph 1(b) above,
- B. 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.
- C. 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.
- D. Claims shall be made promptly to the Company at its principal 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.

**EXHIBIT "C" (CONTINUED)**

E. The protection herein offered extends only to real property transactions in [State].

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 closings of your real estate transactions regarding which you have previously sent (or within 30 hereafter send) written closing instructions to the Issuing Agent or Approved Attorney.

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

**By:** \_\_\_\_\_ **(Title)**

**Accepted:** \_\_\_\_\_  
**(Date)**

**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.)

ALTA Closing Protection Letter (Regulatory)

**EXHIBIT “D”**

**ALTA CLOSING PROTECTION LETTER – NON-RESIDENTIAL LIMITATIONS**

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

Name and Address of Addressee

Date:

Re: Closing Protection Letter

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

When title insurance of \_\_\_\_\_ Title 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:

1. Failure of the 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.

## EXHIBIT "D" (CONTINUED)

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 such 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 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.
- 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. The protection herein offered shall not extend to any transaction in which the funds you transmit to the Agent or Approved Attorney exceed \$\_\_\_\_\_. The Company shall have no liability of any kind for the actions or omissions of the Agent or Approved Attorney in such a 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 have such a transaction and desire the protections of this letter to apply to it. 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).
- E. 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.
- F. Claim shall be made promptly to the Company at its principal 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.
- G. The protection herein offered does not extend to real property transactions in

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 or by your disbursement of funds to the Agent or Approved Attorney identified above after you receive this letter and will continue until canceled by written notice from the Company.

**EXHIBIT "D" (CONTINUED)**

Any previous insured closing service letter or similar agreement is hereby canceled 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:** \_\_\_\_\_  
**(Date)**

**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 “E”**

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

You have requested title insurance of \_\_\_\_\_ Title Insurance Company (the “Company”) is specified for your protection in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or the Approved Attorney [and] 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. If the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed \$ \_\_\_\_\_, 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 closing when conducted by the Issuing Agent or Approved Attorney 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 (13) 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 closing.

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.

## EXHIBIT "E" (CONTINUED)

### Conditions and Exclusions

- A The Company will not be liable to you for loss arising out of:
1. Failure of the 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 such 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.
  3. Mechanics' and materialmen's liens in connection with the Real Estate Transaction if it is a purchase or lease or construction loan transaction, 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 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.
- 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. The protection herein offered shall not extend to the actions of the Issuing Agent or Approved Attorney if the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction exceeds the amount set forth on the first page of this letter and the Company shall have no liability for the mishandling of all or any part of such funds by the Issuing Agent or Approved Attorney except pursuant to an express written agreement between you and the Company made with reference to the Real Estate Transaction.
- E. Any liability of the Company for loss incurred by you in connection with the closing of the Real Estate Transaction by the 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.
- F. Claims shall be made promptly to the Company at its principal 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.

**EXHIBIT "E" (CONTINUED)**

The protection herein offered will be effective upon receipt by the Company of your acceptance of the terms of this letter in writing, which may be made on the enclosed copy hereof, or by your transmission of documents or funds to the Agent or Approved Attorney for the Real Estate Transaction subsequent to your receipt of this letter, which will constitute such acceptance and will continue unless canceled by written notice from the Company. Cancellation shall not extinguish the obligation of the Company hereunder with respect to acts or omissions of the Issuing Agent or Approved Attorney occurring prior thereto.

Any previous insured closing service letter or similar agreement is hereby canceled with respect to the Real Estate Transaction.

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

BY:

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

Accepted: \_\_\_\_\_  
(Date)

By: \_\_\_\_\_  
(Title)

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