NAIC National Association of Insurance Commissioners

Title Insurance Issues (C) Working Group of the Property and Casualty Insurance (C) Committee

September 22, 2009
8:00–9:30
Washington, DC
National Harbor 2 - 3

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Mo Chavez, Chair	New Mexico		
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Margaret Witten	Georgia	Christopher Bean/Sara Waitt	Texas
Kathy Hulbert/Stephen Robertson	Indiana	Brad Tibbits	Utah
Dudley Ewen	Maryland	Michael Beavers/Mary Bannister	Virginia
Pamela Gergen/Paul Hanson	Minnesota	Jim Odiorne	Washington

Agenda

1. Overview of New RESPA Rule—Laura Gipe and Ivy Jackson

2. Update on State and RESPA Collaborative Enforcement Effort—Laura Gipe and Ivy Jackson

3. Overview of Wisconsin Average Premiums Survey of Title Insurers for Comparison Shopping—Commissioner Sean Dilweg—Attachment One

4. Overview of Closing Protection Letters by American Land Title Association (ALTA)–Bruce Davis–Attachment Two

5. HR 3126: Consumer Financial Protection Agency Act of 2009—Avery Brown

6. Update on Proposals Submitted to Blanks (E) Working Group

7. Preliminary Results of Survey of State Laws on Collectability of Title Agent Data—Attachment Three

8. Consider 2009/2010 Work Plan Draft Components and their Prioritization—Attachment Four

9. Any Other Matters Brought Before the Working Group

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Wisconsin Title Insurance Premium Survey

Sean Dilweg, Wisconsin Commissioner of Insurance

September 22, 2009

NAIC Title Insurance Issues (C) Working Group

Why survey title premiums?

- Provide consumers with a reasonable expectation on premiums
- Educate consumers about title insurance regulation and their choices
- Measure the degree of competition within the marketplace

Survey Details

- All underwriters licensed in Wisconsin
- Collect rates for lenders, owners, and refinance rates on residential property
- Insurers provide “average premium rate” charged for specified home values
- Web-based application process

Expectations for Survey

- Consumers can compare average title insurer rates
- Get consumers to shop for title insurance
- Collect premium information statewide.
- Identify marketplace trends

Observations

- Fees collected by title insurers:
  - Difficult to determine collectability and utility of the data
  - Believe it would be helpful for consumers to have more information on associated fees
- Milwaukee County zip codes

Closing Protection Letters

James Bruce Davis
Bean, Kinney & Korman, P.C.
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Arlington, VA

Presentation to the NAIC Property and Casualty Insurance Committee,
Title Insurance Issues Working Group

September 22, 2009

1. What is a closing protection letter? A closing protection letter ("CPL") is a title insurer's agreement to indemnify a lender for certain kinds of losses caused by a settlement agent's failure to follow the lender's written closing instructions or by the settlement agent's fraud, dishonesty or negligence in handing the lender's funds or documents.

2. Why do lenders require CPLs? CPLs protect lenders against risk of settlement agent misconduct. Without a CPL,

   a. a lender would bear the risk that its loan funds might be lost due to settlement agent misconduct; and

   b. the lender would need to restrict the borrower's choice of settlement agents to agents the lender had scrutinized and approved.

3. Why do title insurers issue closing protection letters? Title insurance companies issue CPLs to encourage lenders to order title insurance through the insurance company's Issuing Agents and Approved Attorneys.

4. What is an Issuing Agent? An Issuing Agent is an agent authorized to issue title insurance for the insurance company that issued the CPL.

5. What is an Approved Attorney? An Approved Attorney is an attorney upon whose certification the insurance company issues title insurance. For example, North Carolina

law requires a title insurer to base any policy on an attorney's opinion of title. An attorney whose opinion the insurer will accept is an Approved Attorney.

6. Do CPLs cover closings conducted by anyone other than an Issuing Agent or Approved Attorney? Generally, no. However, the words "Underwritten Title Company" may be substituted for "Issuing Agent" in the 2008 ALTA form. An Underwritten Title Company is a corporation licensed under California law to prepare title searches upon the basis of which a title insurer writes title policies.

7. Are all closing protection letters the same? No. CPL forms vary from state to state and from company to company.

   a. The CPL form promulgated by the American Land Title Association ("ALTA") effective January 1, 2008 is the most common form currently in use.

   b. ALTA has two other CPL forms: Closing Protection Letter - Limitations (2008); and Closing Protection Letter - Single Transaction Limited Liability (2008).

   c. The title insurance rating bureaus for Pennsylvania and New Jersey have promulgated forms of Closing Service Letter for use in those states.

   d. Insurance Commissioners in Florida and Texas have promulgated CPL forms for use in those states. No other CPL forms are permissible.

   e. Other states with unique CPL forms include Arkansas, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Vermont, and Virginia.

   f. New York prohibits title insurers from issuing CPLs for closings in that state.

g. Some lenders, usually large ones, negotiate "master" CPLs that cover all closings conducted by a title insurer's Issuing Agents or Approved Attorneys, except closings in a state where the laws mandate a different form.

8. What form will this presentation cover? This presentation covers ALTA's 2008 CPL form. Other CPL forms differ from ALTA's form in various ways.

9. Whom does a CPL protect?

   a. the lender; and

   b. the lender's assignee and warehouse lender are protected "as if this letter were addressed to them."

   c. the borrower, if the borrower is purchasing or leasing property and if the borrower has ordered title insurance.

10. Who is unprotected? CPLs do not protect:

   a. the seller;

   b. the seller's lender; or

   c. a borrower in a refinancing transaction.

11. What risks are covered?

   a. the settlement agent's failure to follow the lender's written closing instructions; or

   b. the settlement agent's fraud, dishonesty or negligence in handling the lender's funds or documents.

12. What kinds of losses are covered? Losses that affect the title to the mortgaged property or the validity, enforceability or priority of the lender's mortgage.

13. What losses are excluded?

a. failure to follow instructions inconsistent with a commitment for title insurance or binder issued by the company. Instructions are not deemed inconsistent if:

i. the instructions require satisfaction of a commitment requirement; or

ii. the instructions require removal of a title exception reported in the commitment.

b. loss of funds in the course of collection due to bank failure;

c. title problems not covered by the title insurance commitment or policy;

d. fraud, dishonesty or negligence of "your employee, agent, attorney or broker;"

e. the lender's settlement or release of a claim without the insurer's written consent;

f. matters created, suffered, assumed or agreed to by, or known to, the lender.

14. What's the difference between a CPL and a title insurance commitment?

A title insurance commitment is the insurer's agreement to issue a policy on certain terms if the proposed insured satisfies specified requirements. The lender instructs the settlement agent to satisfy these requirements – for example, paying the purchase price owed to a seller or paying off the seller's mortgage. The CPL protects the lender if the settlement agent fails to follow these instructions or acts fraudulently, dishonestly or negligently in handling the lender's funds or documents. The commitment, by itself, does not protect the lender from these risks.

15. What's the difference between a CPL and a title insurance policy?

The CPL protects the lender against the risk that the settlement agent will fail to follow the lender's written closing instructions in a way that impairs the status of title or the validity, enforceability or priority of the lender's mortgage. Unlike the commitment, the CPL does not state what risks the policy will cover. Once the policy is issued, the policy becomes the entire agreement between the title insurer and the lender regarding title risks, superceding the commitment and the CPL.

16. If no CPL were issued, would the title insurer be liable for a settlement agent's misconduct under principles of agency law?

No. In the view of most courts, a title insurance agent is not the insurer's agent for the purpose of conducting closings. A title insurance agent may wear two hats: as an Issuing Agent and as a settlement agent. His authority as an Issuing Agent is limited to issuing title insurance commitments, policies and other title assurances of the insurer. When the Issuing Agent takes off his title insurance agent's hat and puts on his settlement agent's hat, he ceases to represent the title insurance company. Instead, he becomes the joint agent of the parties to the transaction for the purpose of conducting the closing.

An Approved Attorney, as such, is not the title insurer's agent for any purpose.

ALTA's CPL form tells lenders, "Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing other closing or settlement services."

17. Are CPLs Insurance?

The answer varies, depending largely on statutory definitions of title insurance and on whether title insurers charge a premium for issuing a CPL. For closings in most states, title insurers issue CPLs without charge and do not establish reserves for CPL losses. Because risk spreading is a defining characteristic of insurance, most courts that have addressed the issue have concluded that gratuitously issued CPLs are not insurance.

Title insurers issue transaction specific CPLs for closings in New Jersey and Pennsylvania, and the insurers charge a premium for each CPL issued. The title insurance rating bureau for New Jersey adopted this practice in response to a New Jersey Supreme Court decision holding that a CPL should be considered insurance based on its close relationship to a title insurance policy. Subsequently, the title insurance rating bureau for Pennsylvania adopted the same practice.

Statutes or regulations in Arkansas, Louisiana, Missouri, Nebraska and Ohio permit or require title insurers to charge premiums for CPLs covering closings in those states.

Under North Carolina law, title insurers charge a unified premium for a policy and a CPL.

18. <u>Are CPLs consistent with monoline title insurance statutes</u>?

This has been an area of regulatory concern. New York's Insurance Department prohibits title insurers from issuing CPLs for New York closings, having concluded that CPLs resemble fidelity, surety, or professional malpractice insurance policies. In the Insurance Department's view, CPL coverage conflicted with New York's monoline title insurance statute, which limits a title insurer's authority to insuring real estate titles.

ALTA's 1987 form of CPL promised to indemnify the lender for an Issuing Agent's or Approved Attorney's fraud or dishonesty in handling the lender's funds or documents in connection with a closing. This promise arguably covered non-title related risks. For example, lenders sometimes made claims under the 1987 CPL form if a settlement agent misappropriated funds intended to pay off the borrower's unsecured debts or if the settlement agent closed a "flip" transaction that tricked the lender into lending more money than the security property was worth.

In 1995, Virginia's Insurance Commissioner required title insurers to amend their CPLs to curtail coverage of non-title related risks. Title insurers doing business in Virginia responded by adopting a CPL form that covers a settlement agent's fraud or dishonesty "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."

In 1998, ALTA adopted a "Regulatory" CPL form based on the Virginia form. ALTA's 2008 CPL form, like the 1998 Regulatory form, covers only risks affecting title to property or the validity, enforceability or priority of the lender's mortgage.

References:

James Bruce Davis, "The Law of Closing Protection Letters," 36 Tort and Insurance Law Journal 845 (2001) (viewable at www.beankinney.com/pdf/JBD-ClosingProtectionLetters.pdf).

John C Murray, "Closing Protection Letters: What is (and is not) Covered?" (2009) (viewable at http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Title_Insurance/Insured_Closing_%20Letter.pdf)

Joyce Dickey Palomar, Title Insurance Law §§20:11 - 20:16 (West 1997 - 2008)

American Land Title Association **Closing Protection Letter**
Revised 1/01/08

ALTA CLOSING PROTECTION LETTER

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:

Date:

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

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

Re: Closing Protection Letter

Dear

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

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

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

and provided the loss arises out of:

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

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

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

Conditions and Exclusions

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

   A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.

   B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.

   C. Defects, liens, encumbrances or other matters in connection with your purchase, lease or loan transactions except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.

   D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.

   E. Your settlement or release of any claim without the written consent of the Company.

   F. Any matters created, suffered, assumed or agreed to by you or known to you.

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

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

4. The Issuing Agent is the Company's agent only for the limited purpose of issuing title insurance policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.

5. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.

6. You must promptly send written notice of a claim under this letter to the Company at its principal office at ____. The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.

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

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

BLANK TITLE INSURANCE COMPANY

By: ______________________________

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

States Which Responded to the Survey of State Laws on Collectability of Title Agent Data (21 in total)

Hawaii
Idaho
Kansas
Kentucky
Kentucky
Louisiana
Maryland
Massachusetts
Michigan
Michigan
Nebraska
New Hampshire
New Mexico
New York
North Dakota
Puerto Rico
Tennessee
Texas
Washington
Wisconsin
Wyoming

NAIC Title Insurance Issues Working Group

Work Plan for 2009 / 2010

Discussion Draft for September 22 Meeting

a. Develop a nationwide title statistical plan

   i. State Page data from title insurers

   ii. Data from title agents and others involved in "the business of title insurance"

      1. Conduct survey to determine the extent to which current state laws and regulations allow for the collection of data from title agents, attorneys, abstracters and escrow officers

      2. Analyze survey results and consider whether or how to proceed with designing, collecting and auditing data from title agents et al

b. Consider ways to improve the solvency regulation of title insurers

   i. Coordinate with Financial Condition (E) Committee to determine the attributes of recent title company financial failures

   ii. Coordinate with Financial Condition (E) Committee to identify property/casualty solvency requirements (e.g. Risk-Based Capital) and early warning tools (e.g. IRIS ratios) not currently applied to title insurers and consider whether they should be introduced

c. Consider ways to mitigate the impact of insolvencies on policyholders

   i. Consider whether to revive work on the 1992 draft of the Title Insurance Guaranty Fund Model Act

   ii. Consider the merits of promoting the use of blanket lender's policies and individual owner's policies to replace policies issued by now-insolvent insurers

d. Consider ways to maintain and improve competitive markets

   i. Examine and evaluate the original purposes and current effectiveness of monoline title insurance laws

   ii. Investigate other methods to improve the competitiveness of title companies and title agents

e. Explore ways to promote effective consumer shopping for title agents and insurers

   i. Develop Best Practices for the design and implementation of title cost comparison guides for consumers

   ii. Explore ways to allow consumers to shop for a title agent without delaying real estate closing schedules

f. Promote fair, compliant and transparent real estate settlement practices by title agents and title insurers

   i. Assist HUD with the identification and enforcement of RESPA violations

   ii. Consider involvement in efforts to mitigate title agent defalcations

      1. Assess our authority over escrow and closing functions

      2. Consider the merits of Closing Protection Letters and other remedies

g. Assist in combating mortgage fraud

h. Title Model Acts

   i. Identify areas where the current Title Insurer and Title Agent Model Acts need updates or enhancements

   ii. Draft a Title Insurance Regulatory Issues paper that could be converted, if desired, into a revised Title Model Act or a Best Practices document