

# **ALTA APPROVES REVISED CLOSING PROTECTION LETTERS**

**By Jonathan S.R. Anderson**

## **INTRODUCTION**

Recently, the American Land Title Association (ALTA) approved three new closing protection letter forms. These forms do not significantly change the coverage traditionally provided by closing protection letters (sometimes referred to as insured closing letters), but these new forms do clarify the extent of the title insurer's liability and the limitations on that liability.

## **DISCUSSION**

The closing protection letter is a document that is almost always requested by a lender when that lender is securing a loan or other obligation with a mortgage on real property and the mortgage is being insured with a title insurance policy. In cases where an agent of the insurer is representing the borrower and/or the lender, and is also issuing the title policy insuring the lender, the lender will require that the title insurer issue a closing protection letter regarding the agent. The closing protection letter (CPL) identifies the agent and confirms that the agent is either an "Issuing Agent" or an "Approved Attorney." An Issuing Agent is authorized to issue a title insurance policy on behalf of the title insurer, while an Approved Attorney is one whose opinion of title is relied upon by the title insurer when issuing a policy.

After confirming that the party identified is an agent for the title insurer, the insurer issuing the CPL agrees to reimburse the addressee (usually a lender but may also be either a purchaser or a lessee) for certain types of losses caused by the agent in connection with the agent's closing of a real estate transaction or transactions. More precisely, the title insurer agrees to reimburse the addressee for actual losses incurred when the loss arises out of either:

- (1) failure of the agent to comply with the lender's written closing instructions, but only to the extent those instructions relate to the status of title or the validity, enforceability and priority of the lender's mortgage, or if the instructions require the agent to obtain documents, but only to the extent that the agent's failure to obtain the documents affects the status of title or the validity, enforceability and priority of the mortgage; or
- (2) fraud, dishonesty or negligence in handling funds or documents in connection with the closing, but only to the extent that the fraud, negligence or dishonesty relates to the status of title or to the validity, enforceability and priority of the mortgage.

The indemnity provisions appearing in the CPL make it clear that the liability of the title insurer is limited to cases where the agent's conduct affects the status of title or the validity, enforceability and priority of the mortgage. Older CPL forms were sometimes rejected by state regulators because the older versions did not contain this clarifying language, leading the

regulators to conclude that the indemnity provisions were overly broad (that is, not tied to the title-related losses).

As in prior versions, the revised CPL forms contain conditions and exclusions further clarifying the title insurers' liability. Under the basic CPL form, a title insurer issuing the letter will not be liable for loss resulting from either:

- a. failure of the agent to comply with closing instructions when those instructions require title insurance coverage that is inconsistent with a related policy binder or commitment (but this condition does not apply to situations where the instructions require either the removal of specific exceptions or compliance with requirements set out in the binder or commitment);
- b. loss or impairment of funds on deposit in a bank due to the bank's failure or insolvency (but this condition does not apply to cases where the loss results from an agent's failure to comply with the lender's specific closing instructions to deposit the funds in a particular bank);
- c. defects, liens or encumbrances affecting any purchase, lease or loan transactions (except, of course, when a policy of title insurance issued pursuant to the addressee's closing instructions provides protection against those defects, liens and encumbrances);
- d. fraud, dishonesty or negligence of the addressee's employee, agent, attorney or broker;
- e. the addressee's settlement or release of any claim without the written consent of the title insurer; or
- f. any matters created, suffered, assumed or agreed to by the addressee or known to the addressee.

There are other conditions as well. In cases where an Approved Attorney (as opposed to an Issuing Agent) is conducting the closing, a title binder or commitment for a policy from the title insurer that issued the CPL must be received by the addressee prior to the time when the final closing instructions are given to the Approved Attorney. In addition, the CPL emphasizes that the agent referred to in the letter is title insurer's agent only for the limited purpose of issuing title insurance policies, and is not the insurer's agent for the purpose of providing other closing or settlement services. Therefore, the title insurer's liability for losses arising out of any of these other services is limited to protection expressly provided in the CPL.

The CPL also contains subrogation provisions, a direction regarding when and where a notice of claim should be sent, and a paragraph regarding the ability of both the insurer and the addressee of the letter to have a claim arising under the CPL submitted to arbitration.

Other limitations on the liability of the title insurer under the CPL depend upon which of the three newly approved forms the addressee receives. The basic CPL form is titled the "ALTA

Closing Protection Letter," and it is the provisions of that form that have been discussed at length in this article.

The other two forms contain provisions that are very similar to those referred to above, but contain important additional limitations on liability. The form titled "ALTA Closing Protection Letter – Limitations" resembles the basic ALTA Closing Protection Letter, but it contains an important limitation on liability in the Conditions and Exclusions section of the CPL. That additional paragraph states:

The protection herein offered shall not extend to any transaction in which the funds you (the addressee) transmit to the Issuing Agent or Approved Attorney exceed \$\_\_\_\_\_ ....

The paragraph then continues by stating that if the lender or other addressee wants protection to extend to a transaction where the funds transmitted to the agent will be more than the amount referred to above, the addressee should contact the title insurer. The paragraph's final sentence states that the paragraph will not apply to individual mortgage loan transactions on individual one-to-four family residential properties, including townhouse, condominium and cooperative apartment units. In other words, this limitation does not apply to most residential transactions.

The third form is titled "Closing Protection Letter – Single Transaction Limited Liability" and protects against loss in connection with the closing of a single real estate transaction. There is also an additional limitation on the insurer's liability because the protection under the CPL is conditioned upon the funds transmitted by the addressee to the agent not exceeding a particular amount.

## **CONCLUSION**

There are three new Closing Protection Forms that have been approved by the American Land Title Association: (1) the ALTA Closing Protection Letter, which offers the broadest protection against loss caused by an agent of the title insurer; (2) the ALTA Closing Protection Letter – Limitations, which offers similar protection, but this form of CPL also contains a condition stating that the protection under the letter is not provided where the funds transmitted by the lender (or other addressee) to the title insurer's agent exceed a certain amount; and (3) the Closing Protection Letter – Single Transaction Limited Liability, which further limits the liability to cases involving a single transaction, so long as the funds transmitted to the agent do not exceed a specified amount.

Each form may be viewed on the ALTA website ([www.alta.org](http://www.alta.org)) under Forms and Standards. The CPL forms appear under the heading "Recently Adopted or Revised Forms Effective 1/1/08."

The CPL forms obligate the title insurer to reimburse the closing protection letter's addressee (usually a lender, but the addressee may also be a purchaser or a lessee of the property) for actual loss incurred in connection with a closing conducted by the title insurer's agent. The loss may

result because of the agent's failure to follow closing instructions, the failure to obtain required documents or because there is fraud, dishonesty or negligence in the agent's handling of funds or documents in connection with the closing.

The new forms clarify what has traditionally been the liability of the title insurer under any CPL: that the liability arises only to the extent that the closing instructions and/or the agent's fraudulent or negligent conduct affects either the status of title or the validity, enforceability and priority of a mortgage that is to be insured by the title insurer obligated under the CPL.

The CPL forms also make it clear that the title insurer is not liable for loss resulting from certain matters beyond its control and for loss created or agreed to by the lender or other addressee. Furthermore, the protection offered by the CPL does not extend to cases where the loss is caused by the fraud, dishonesty or negligence of the addressee's employee, attorney, broker or agent, or by the fraud or bad faith of any party other than the Issuing Agent or Approved Attorney referred to in the CPL.

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