

## **Closing Protection Letters for Title Insurance: Key Provisions, Common Issues, Recent ALTA Revisions**

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TUESDAY, DECEMBER 10, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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# Closing Protection Letters for Title Insurance: Key Provisions, Common Issues, Recent ALTA Revisions



# Presenters



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## What Is A CSL?

- The purpose of a Closing Protection Letter (“CPL”) or Closing Service Letter (“CSL”) is “to provide indemnity against loss due to a closing attorney’s defalcation or failure to follow a lender’s closing instructions.”
  - J. Bushnell Nielsen’s Title & Escrow Claims Guide §14.1 (Woodridge Legal Publishers 2019)(citations omitted)
  - See also 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”).
- The CSL will specify the name of the closing agent or attorney whose conduct is covered.
- The CSL’s protections can cover lenders, borrowers (if the property is improved solely by a 1-4 family residence), assignees of the loan, and warehouse lenders.

## The Standard Insuring Language

- **The current language of the Standard CSL requires that “[y]our loss is solely caused by:**
  - (a) a failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:**
    - (i) (A) the disbursement of Funds necessary to establish the status of the Title to the Land; or**
    - (B) the validity, enforceability, or priority of the lien of the Insured Mortgage; or**
    - (ii) obtaining any document, specifically required by You, but only to the extent that the failure to obtain the document adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land; or**
  - (b) fraud, theft, dishonesty, or misappropriation by the Issuing Agent or Approved Attorney in handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land.”**

## Does the CSL Only Cover Title Issues?

- By its terms, it traditionally does. See J. Bushnell Nielsen, Title and Escrow Claims Guide at 14.2.
- But see First American Title Insurance Company v. Vision Mortgage Corp., Inc., 298 N.J. Super. 138 (App. Div. 1997). There, individuals masterminded a scheme to defraud the defendant lender by applying for and securing a loan in the name of an individual who had no knowledge of the transaction. Plaintiff issued a CSL and a policy. Defendant later demanded reimbursement when it discovered the fraud and that the value of the property was not sufficient to satisfy the loan, but the title insurer denied the claim. The court ruled for the lender, stating that “by making Levenson an Approved Attorney, First American put him in the position to steal from Vision . . . As such, Vision’s losses, even those related to the careless valuation of the property, fell within the expansive coverage of the title insurance policy.”

## Basic Terms of a CSL

- A CSL “creates no obligation on the part of the title insurer unless and until the lender orders title insurance from the company and delivers closing funds and documents to the settlement agent. . . . Only after the lender has taken these actions does the [CSL] obligate the title insurer to indemnify the lender” thereunder. James Bruce Davis, The Law of Closing Protection Letters, 36 Tort & Ins. L.J. 853 (2001).
  - The CSL provides that “[i]f the closing is to be conducted by an Approved Attorney, a Commitment in connection with the Real Estate Transaction must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.” See CSL at Conditions and Exclusions, ¶4.

## Basic Terms of a CSL

- **The CSL incorporates the terms of the policy including the exclusions and exceptions and, as such, those exclusions and exceptions are applicable to the coverage afforded under the CSL.**
- **The CSL also excludes from coverage any requirements by the lender that are inconsistent with the title commitment, any loss arising from insolvency of the bank in which the loan proceeds have been deposited, and mechanics' liens (except to the extent that protection is afforded by the title insurance binder, commitment or policy).**

# ALTA STANDARD FORM



AMERICAN  

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LAND TITLE  

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ASSOCIATION



TM

**CLOSING PROTECTION LETTER  
SINGLE TRANSACTION  
BLANK TITLE INSURANCE COMPANY**

"Addressee":

"Date":

"Issuing Agent" or "Approved Attorney":

[Issuing Office:

Issuing Office's ALTA® Registry ID:]

"Real Estate Transaction":

[Seller:

Buyer:

Street Address:

Loan Number:]

Re: Closing Protection Letter

Dear

In consideration of Your acceptance of this letter, *Blank Title Insurance Company* (the "Company"), agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the Date of this letter, subject to the Requirements and Conditions and Exclusions set forth below:

**REQUIREMENTS**

1. The Company issues or is contractually obligated to issue a Policy for Your protection in connection with the Real Estate Transaction;
2. You are to be:
  - (a) a lender secured by the Insured Mortgage on the Title to the Land; or
  - (b) a purchaser or lessee of the Title to the Land;
3. The aggregate of all Funds You transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed \$ \_\_\_\_\_; and
4. Your loss is solely caused by:
  - (a) a failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
    - (i) (A) the disbursement of Funds necessary to establish the status of the Title to the Land; or
    - (B) the validity, enforceability, or priority of the lien of the Insured Mortgage; or
  - (ii) obtaining any document, specifically required by You, but only to the extent that the failure to obtain the document adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land; or
- (b) fraud, theft, dishonesty, or misappropriation by the Issuing Agent or Approved Attorney in

handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land.

### **CONDITIONS AND EXCLUSIONS**

1. Your transmittal of Funds or documents to the Issuing Agent or Approved Attorney for the Real Estate Transaction constitutes Your acceptance of this letter.
2. For purposes of this letter:
  - (a) "Commitment" means the Company's written contractual agreement to issue the Policy.
  - (b) "Funds" means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.
  - (c) "Policy" means the contract or contracts of title insurance, each in a form adopted by the American Land Title Association, issued or to be issued by the Company in connection with the closing of the Real Estate Transaction.
  - (d) "You" or "Your" means:
    - (i) the Addressee of this letter;
    - (ii) the borrower, if the Land is improved solely by a one-to-four family residence; and
    - (iii) subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,
      - (A) the assignee of the Insured Mortgage, provided such assignment was for value and the assignee was, at the time of the assignment, without Knowledge of facts that reveal a claim under this letter; and
      - (B) the warehouse lender in connection with the Insured Mortgage.
  - (e) "Indebtedness," "Insured Mortgage," "Knowledge" or "Known," "Land," and "Title" have the same meaning given them in the American Land Title Association Loan Policy.
3. The Company shall have no liability under this letter for any loss arising from any:
  - (a) failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection in connection with the Real Estate Transaction inconsistent with that set forth in the Commitment. Your written closing instructions received and accepted by the Issuing Agent or Approved Attorney after issuing the Commitment that require the removal, where allowed by state law, rule, or regulation, of specific Schedule B Exceptions from Coverage or compliance with the requirements contained in the Commitment shall not be deemed to require inconsistent title insurance protection;
  - (b) loss or impairment of Funds in the course of collection or while on deposit with a bank due to bank failure, insolvency, or suspension, except loss or impairment resulting from failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions to deposit Your Funds in a bank that You designated by name;
  - (c) constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation. This Section 3.(c) does not affect the coverage, if any, as to any lien for services, labor, materials, or equipment afforded in the Policy;
  - (d) defect, lien, encumbrance, or other matter in connection with the Real Estate Transaction. This Section 3.(d) does not affect the coverage afforded in the Policy;
  - (e) fraud, theft, dishonesty, misappropriation, or negligence by You or by Your employee, agent, attorney, or broker;

- (f) fraud, theft, dishonesty, or misappropriation by anyone other than the Company, Issuing Agent, or Approved Attorney;
  - (g) settlement or release of any claim by You without the Company's written consent;
  - (h) matters created, suffered, assumed, agreed to, or Known by You;
  - (i) failure of the Issuing Agent or Approved Attorney to determine the validity, enforceability, or the effectiveness of a document required by Your closing instructions. This Section 3.(i) does not affect the coverage afforded in the Policy;
  - (j) Federal consumer financial law, as defined in 12 U.S.C. § 5481(14), actions under 12 U.S.C. § 5531, or other federal or state laws relating to truth-in-lending, a borrower's ability to repay a loan, qualified mortgages, consumer protection, or predatory lending, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;
  - (k) federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;
  - (l) periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land;
  - (m) Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code; or
  - (n) wire fraud, mail fraud, telephone fraud, facsimile fraud, unauthorized access to a computer, network, email, or document production system, business email compromise, identity theft, or diversion of Funds to a person or account not entitled to receive the Funds [perpetrated by anyone other than the Company, Issuing Agent, or Approved Attorney].
4. If the closing is to be conducted by an Approved Attorney, a Commitment in connection with the Real Estate Transaction must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.
5. When the Company shall have indemnified You pursuant to this letter, it shall be subrogated to all rights and remedies You have against any person or property had You not been indemnified. The Company's liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation.
6. The Company's liability for loss under this letter shall not exceed the least of:
- (a) the amount of Your Funds;
  - (b) the Company's liability under the Policy at the time written notice of a claim is made under this letter;
  - (c) the value of the lien of the Insured Mortgage;
  - (d) the value of the Title to the Land insured or to be insured under the Policy at the time written notice of a claim is made under this letter; or
  - (e) the amount stated in Section 3 of the Requirements.
7. The Company will be liable only to the holder of the Indebtedness at the time that payment is made. This Section 7 does not apply to a purchaser, borrower, or lessee.
8. Payment to You or to the owner of the Indebtedness under either the Policy or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.
9. The Issuing Agent is the Company's agent only for the limited purpose of issuing policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or

settlement services is strictly limited to the contractual protection expressly provided in this letter. The Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

10. In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this Section 10 shall not be excused by lack of prejudice to the Company.
11. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_ . If the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice.
12. Whenever requested by the Company, You, at the Company's expense, shall:
  - (a) give the Company all reasonable aid in:
    - (i) securing evidence, obtaining witnesses, prosecuting, or defending any action or proceeding, or effecting any settlement; and
    - (ii) any other lawful act that in the opinion of the Company may be necessary to enable the Company's investigation and determination of its liability under this letter;
  - (b) deliver to the Company any records, in whatever medium maintained, that pertain to the Real Estate Transaction or any claim under this letter; and
  - (c) submit to an examination under oath by any authorized representative of the Company with respect to any such records, the Real Estate Transaction, any claim under this letter or any other matter reasonably deemed relevant by the Company.
13. The Company shall have no liability under this letter if:
  - (a) the Real Estate Transaction has not closed within one year from the date of this letter; or
  - (b) at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above.
14. The protection of this letter extends only to real estate in [State], and any court or arbitrator shall apply the law of the jurisdiction where the Land is located to interpret and enforce the terms of this letter. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. Any litigation or other proceeding under this letter must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.
15. There shall be no right for any claim under this letter to be arbitrated or litigated on a class action basis.
- [16. 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 for the Real Estate Transaction with an Amount of Insurance greater than \$2,000,000. If You have a Policy for the Real Estate 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. [If the Real Estate Transaction solely involves a one-to-four family residence and You are the purchaser or borrower, the Company will pay the costs of arbitration.]]

This letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction and may not be modified by the Issuing Agent or Approved Attorney.

## **ALTA Standard Form Revisions (2015 and 2018)**

- **Background of the Revisions**
  - **The Board approved a recommendation from the Forms Committee to revise the Closing Protection Letters:**
    - **ALTA Closing Protection Letter – Single Transaction (12-01-2015)**
    - **ALTA Closing Protection Letter – Multiple Transactions (12-01-2015)**
      - **There is no major difference between the two CPL Forms.**
  - **The committee recognized the need to address the epidemic of wire fraud incidents and attempts, including a clarification of coverage extended to customers in the CPLs. The following changes were approved by the ALTA Board:**

## ALTA Standard Form Revisions

- **2015 Changes include:**
  - **A new heading of “Requirements” for the introductory section.**
  - **Clarification that assignees of the loan may be covered, so long as the assignment was for value and the assignee was without Knowledge of the claim at the time of assignment, and that assignees are subject to the claims/defenses the insurer would have against the original lender.**
  - **Clarification that the coverage relating to defects, liens, encumbrances or other matters in connection with the transaction is provided to the extent afforded in the Policy.**

## ALTA Standard Form Revisions

- **Additional 2015 Changes include:**
  - **Recognition that the exclusions for particular laws include the failure of the Issuing Agent or Approved Attorney to comply with closing instructions relating to those laws.**
  - **As provided in prior letters, acknowledgment that the Company is liable only to the holder of the Indebtedness at the time payment is made.**
  - **Cooperation requirements applicable to the Addressee.**
  - **Recital that the letter may not be modified by the Issuing Agent or Approved Attorney.**

## ALTA Standard Form Revisions

- In 2018, ALTA made some additional revisions to the 2015 Standard Form:
  - Adding that the Company shall have no liability under the letter for any loss arising from “fraud, theft, dishonesty, or misappropriation by anyone other than the Company, Issuing Agent, or Approved Attorney” or “wire fraud, mail fraud, telephone fraud, facsimile fraud, unauthorized access to a computer, network, email, or document production system, business email compromise, identity theft, or diversion of Funds to a person or account not entitled to receive the Funds [perpetrated by anyone other than the Company, Issuing Agent, or Approved Attorney].”
  - Adding a separate paragraph saying “[t]here shall be no right for any claim under this letter to be arbitrated or litigated on a class action basis” (in 2015, this sentence was part of a larger paragraph).

## State Regulations

- **All states have approved CSL forms, and the language of the forms varies by state. For example:**
  - **Nebraska**
    - **Restricts closing protection letters to indemnifying against the closing agent's theft of settlement funds and failure to comply with written closing instructions.**
  - **Washington**
    - **Expressly limits title insurance underwriters to issuing such letters only when the title company or attorney also is issuing a title insurance policy in the transaction.**
  - **Pennsylvania**
    - **Pennsylvania prohibits “blanket” letters that would cover a lender for all escrow closing activities and services from a particular agent over a designated time and, instead, requires issuance of a new letter for each transaction.**

# FDIC and CSLs



## FDIC Litigations

- **Two Principles of Case Law**
  - **(1) Standing**
    - **FDIC has standing to pursue CSL claims even when they sold the loan (but retained the CSL). For example:**
      - **FDIC v. Prop. Transfer Servs., Inc., 2013 WL 5535561, at \*1 (S.D. Fla. Oct. 7, 2013) (First American issued the CPLs to a lender and its successors and assigns. The FDIC stepped into the lender's shoes as receiver and acquired its CPL rights. The CPLs did not state that the lender would lose its indemnification rights if it transferred or sold the loans. Therefore, the FDIC did not forfeit the lender's CPL protections when it transferred the loans to a second bank and the FDIC continues to hold those indemnification rights).**
      - **JPMorgan Chase Bank v. First American Title Ins. Co., 750 F.3d 573 (6th Cir. 2014) (affirming summary judgment for the FDIC against arguments of standing (to bring a claim under CPL), loss causation, and improper calculation of damages in relation to a CPL).**
      - **FDIC v. Attorney's Title Ins. Fund., 2014 WL 4384270, at \*3 (S.D. Fla. Sept. 3, 2014) (The Court held that the FDIC had standing to pursue its CPL claims over the title insurance company's arguments that it lacked standing because Washington Mutual Bank sold the loans to Chase in 2008).**

## FDIC Litigations

- (2) Despite the policy's limitation of damages to the lesser of the policy amount, the amount due on the loan, or the diminution of value of the property caused by the defect, the FDIC has established case law allowing for recovery for more than the value of the property:
  - JP Morgan Chase Bank, N.A. v. First Am. Title Ins. Co., 795 F. Supp. 2d 624, 630 (E.D. Mich. 2011), aff'd sub nom. JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co., 750 F.3d 573 (6th Cir. 2014), as amended (July 2, 2014) (in a case in which the FDIC intervened, finding that the insurer could be liable for almost \$2 million more than the value of the property because that amount "is [still] less than the \$4.5 million its agent stole.").
  - F.D.I.C. v. Prop. Transfer Servs., Inc., 2013 WL 5535561, at \*17 (S.D. Fla. Oct. 7, 2013) (holding that the insurer was liable for the full amount of the loan (unpaid principal, plus interest, plus taxes and insurance) minus the net sale proceeds).
  - Bank of Am., NA v. Fid. Nat. Title Ins. Co., 316 Mich. App. 480, 524 (2016) (finding that full credit bid rule was inapplicable to CPL claims and that lender could seek damages against title insurer above full credit bid amount) (non-FDIC case).

# FILING A TIMELY CLAIM



## Filing a Timely Claim

- **In 2015, ALTA’s Standard CPL was amended to state, “[i]n no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this Section 10 shall not be excused by lack of prejudice to the Company.”**
- **It also states that “[i]f the Company is prejudiced by Your failure to provide prompt notice, the Company’s liability to You under this letter shall be reduced to the extent of the prejudice.”**

## Filing a Timely Claim

- In Florida, CPLs contain a provision that any claims under the CPL must be made “within ninety (90) days from the date of discovery of such loss.” Prejudice is not at issue.
  - In Fed. Deposit Ins. Corp. AmTrust Bank v. Fid. Nat'l Title Ins. Co., 2017 WL 2734092, at \*5 (S.D. Fla. June 23, 2017), the Court found that “the notice period is triggered only when Plaintiff has discovered both a potential claim and its actual losses,” but nonetheless granted the insurer’s motion for summary judgment because the claim was untimely.
  - Other states’ CPLs still require prejudice to be shown before coverage is lost for untimely notice: e.g., New Jersey.

## Filing a Timely Claim

- Some courts differ on their enforcement of CPL notice provisions. For example:
  - JP Morgan Chase Bank, N.A. v. FDIC, 2011 WL 2413438 (E.D. Mich. June 10, 2011) (rejecting the title insurers argument that the FDIC's CPL claim is barred because of failure to promptly notify title insurer pursuant to "notice" clause in CPL, holding that insurer was aware of the fraud that occurred and was preparing itself to defend the case).
  - Primary Residential Mortgage, Inc. v. Guarantee Title Ins. Co., 2005 WL 2874663 (E.D. Mo. Nov. 1, 2005) (defendant title insurer moved to dismiss complaint for, among other things, failure of plaintiff to give timely notice of the claim. Court denied defendant's motion to dismiss, citing that promptness of notice is a factual dispute not properly determined on a motion to dismiss).
  - F.D.I.C. v. Prop. Transfer Servs., Inc., 2013 WL 5535561, at \*8 (S.D. Fla. Oct. 7, 2013) (defendant title insurer argued that the FDIC's designated witness did not have personal knowledge of when the FDIC first discovered the CPL claim and, therefore, the FDIC failed to show it met the 90-day notice provision. The court rejected the argument and held that once the FDIC discovered the mortgage fraud scheme they promptly gave notice).

## **What Happens When There Is No CSL?**

- **Two different results:**
  - ❑ In **Sears Mortgage Corp. v. Rose**, 134 N.J. 326 (1993), even though a CPL had not been issued, the Supreme Court of New Jersey held that the buyer's attorney who misappropriated funds was an agent of the title insurer because of the nature and extent of the attorney's duties. The court held that the title insurer was liable to the buyer for both a breach of good faith and fair dealing, as well as under general principles of agency liability.
  - ❑ In **Plaza Home Mortgage, Inc. v. Fidelity National Title Insurance Co.**, 145 A.D.3d 1048 (2d Dept. 2016), the court held that a lender created its own loss and was barred from coverage when it wired its payoff funds to the borrower's counsel, who absconded with the funds rather than paying off the prior mortgage.

**QUESTIONS?**