

## The New ALTA Closing Protection Letters

***In 2008, the American Land Title Association (“ALTA”) adopted three new forms of closing protection letters (“CPL” or “CPLs”) for use by the industry. This article will discuss briefly the contents of the different CPLs, and their place in the scope of indemnity coverage for the customer.***

### What the Closing Protection Letter Covers:

The indemnity of the CPL covers actual loss incurred by the recipient of the CPL in connection with closings of real estate transactions conducted by the title company identified in the letter (issuing Agent), provided that title insurance to be issued by the title insurer issuing the CPL is specified in connection with the closing and the recipient is a :

- (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.

The coverage of the CPL is not for all losses in connection with the closing, but only for losses arising out of failure of the Issuing Agent to comply with the written closing instructions to the extent that the closing instructions relate to the status of the title to the land being obtained by the recipient of the CPL. If it is a lender receiving the CPL, coverage for actual loss is provided to the recipient of the CPL to the extent that the failure of the Issuing Agent to comply with the closing instructions affects the validity, priority, or enforceability of the deed of trust or mortgage on the land. Actual loss is covered in both of these cases if it is due to the obtaining of any document specifically required by the recipient of the CPL, or the improper disbursement of funds necessary to establish the title or lien of the recipient of the CPL. No coverage is provided for any closing instructions that require the Issuing Agent to determine the validity, enforceability, or effectiveness of any document.

Additional coverage for actual loss is provided by the CPL for fraud, dishonesty or negligence of the Issuing Agent in handling the funds of documents in connection with the closings to the extent that the fraud, dishonesty, or negligence relates to the title to the land or to the validity, enforceability, or priority of the deed of trust.

If the CPL is provided to a lender, the coverage of the CPL is also extended to the borrower, an assignee of this lender, or the lender’s warehouse lender.

### What the Closing Protection Letter Does Not Cover:

The CPL does not cover:

- (i) Failure of the Issuing Agent to comply with closing instructions requiring title insurance coverage inconsistent with the title commitment, preliminary report or binder;
- (ii) Loss by reason of bank failure, insolvency, or suspension UNLESS the Issuing Agent failed to comply with closing instructions to deposit the funds in a designated bank;
- (iii) Defects, liens, encumbrances, or other matters in connection with the closing except to the extent that coverage is provided for those matters by a policy of title insurance not inconsistent with the closing instructions;
- (iv) Fraud, dishonesty, or negligence of the employee, agent, attorney, or broker of the recipient of the CPL;
- (v) Settlements or releases of claims done without the consent of the title insurer issuing the CPL;
- (vi) Matters created, suffered, assumed, or agreed to or known to the recipient of the CPL.

### Other Conditions of the CPL:

If the title insurer reimburses that recipient of the letter, it is subrogated (allowed to exercise for its own behalf) the rights and remedies or the recipient of the letter to try to recover the losses. If this right of subrogation is impaired, it will reduce the amount paid for any losses under the CPL to the extent of the impairment. The CPL also clarifies that the Issuing Agent is only the agent of the title insurer for the purposes of issuing title insurance policies. The Issuing Agent is NOT the agent of the title insurer for purposes of providing closing or settlement services. Any loss for closing or settlement services is limited to that provided by the CPL only. The letter also clarifies that it does not cover loss by reason of the negligence, fraud, or bad faith of any party to the transaction or the lack of creditworthiness of the borrower.

The title insurer issuing the CPL or the recipient of the CPL may demand that any matter to be decided under the CPL go to arbitration unless the title policy for the application transaction has been issued in an amount over \$2,000,000.

Notice of any claims must be presented to the title insurer issuing the CPL promptly at the address listed on the letter. Once a CPL is issued, any previous CPL or similar agreement or letter is cancelled, except for closings for which written closing instructions are already sent, or are sent within 30 days after the sending of this CPL.

### Differences in the Three ALTA Closing Protection Letter Forms:

The three forms created by ALTA. One is for the issuance of a CPL for transactions of the Issuing Agent on a go forward basis until the letter is terminated. Another is a CPL to be issued for a specific transaction. The last contains a limitation of liability that caps the loss payable under the CPL.

### Conclusion:

The CPL is not an insurance product, but instead is a letter of indemnity for actual loss occasioned by certain acts, negligence, etc. of the Issuing Agent that is intended to serve as a bridge to the title insurance that is provided after a transaction closed. The California Insurance Code allows for the issuance of CPLs only for “underwritten title companies with whom the title insurer maintains an underwriting agreement.” It is customary not to charge for a CPL in California even though the California Insurance Code does allow for a charge. The CPL is not meant to provide coverage for any and all acts, omissions, fraud, or negligence of the Issuing Agent, but only for very specific matters identified in the CPL, nor is the CPL meant to provide coverage for acts, omissions, fraud, or negligence of anyone else.

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*To fully understand the CPL, it should be read carefully, and any questions should be addressed to your attorney for advice.*

***Should you have ANY questions, please call on Stewart for all your Title, Escrow, and transaction management needs.***