



# Unraveling the Closing Protection Letter

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# The Closing Protection Letter

- What is a CPL?
- Who Issues the CPL?
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# What is a CPL?



- The Closing Protection Letter (CPL) is intended to protect the funding lender from certain acts or omissions of the closing agent
- CPL's have been around since the 1960s
- Lender's require CPL's because the agency-principal relationship between a title underwriter and a policy-issuing agent is limited to the issuance of a title insurance policy, and such a relationship does not extend to escrow or closing functions

# Who issues the CPL?

Although the CPL covers the closing, the CPL itself is provided by the title underwriter insuring the transaction being closed. It is always written by the underwriter, but most allow access to an automated system where ***their agents*** can generate the letter



# When is a CPL Issued?

Initially, a CPL was meant to be issued only in connection with a title policy issued by the underwriter when the closing was being conducted by it's policy issuing agent rather than when the closing is conducted by the underwriter itself. But they are issued for direct operations too.



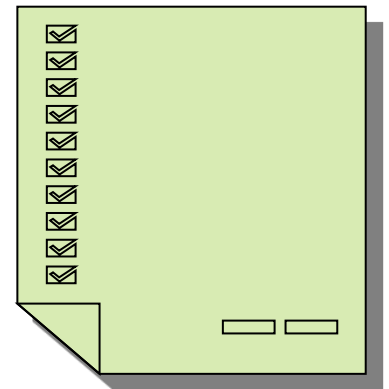
# The CPL Form

The American Land Title Association (ALTA) initially drafted many forms

- A master letter (covering multiple transactions), a **single transaction** letter, a master letter with limits, and a single transaction letter with limits

Currently, Washington underwriters use the ALTA **single transaction** form

- But other states have regulations promulgating different forms



# CPL v. Title Policy Coverage

The Title Insurance Policy protects against losses resulting from ***title related matters***

The CPL protects against losses resulting from the closing process (***not title matters***)

- Shows closer's specific company name and names it as the closing entity
- Issued by the title ***insurer***



# Insuring Provisions



Company agrees, subject to the Conditions and Exclusions set forth below, to **reimburse you for actual loss** incurred by in 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.

**[\*NOTE that a buyer in a cash transaction can get the letter]**

**And provided the loss arises out of:**



# Insuring Provision 1



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

# Insuring Provision 2



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.

## Insuring Provision 2

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.

# Exclusions from Coverage

Conditions and Exclusions:

1. The Company will not be liable to your 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.***

# Exclusions from Coverage

Conditions and Exclusions:

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

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.



# Exclusions from Coverage

Conditions and Exclusions:

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

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.

***[In other words “title insurance” is excluded – this is not a title insurance policy; but the policy itself still applies]***



# Exclusions from Coverage

Conditions and Exclusions:

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

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



# Conditions and Exclusions:

Among others:

...the lack of ***creditworthiness of any borrower*** with a real estate transaction,

or the ***failure of any collateral to adequately secure a loan*** connected with a real estate transaction...





# Exclusions to Coverage

Why do lenders accept the *exclusions* to coverage contained in the CPL?

- CPLs are standardized indemnity agreements.
- Few people read the letter until they have a claim.

Example: Lender comes to title company with a potential CPL claim stating that the borrower's loan application was fraudulent.

This is not covered by the CPL as it is the lender's job to credit qualify the borrower.



# State-Mandated Forms

- Because the CPL covers the closing, the form used must be in compliance with the state ***where the closing takes place***, regardless of whether the property or the title insurer are located in that state



# Statutory and Regulatory Restrictions

Washington uses the basic  
ALTA single transaction form



# Statutory and Regulatory Restrictions

Although the ALTA forms of CPLs generally are used in most states, some states restrict, limit, prohibit or even expand their use. The rationale for prohibiting or restricting the use of CPLs 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 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.

# Statutory and Regulatory Restrictions

Most states, however, permit the use of the approved ALTA forms. State regulators in these states generally take the position that the issuance of CPL's, which assure as to certain actions of the title insurer's own policy-issuing agent, do not violate the state's statutes or regulations so long as (1) ***a policy is being issued in connection with the subject transaction*** and (2) it ***applies only to its agent.***

# Washington State

RCW 48.05.330(3) 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 CPL for the insurer’s agent; and it does not have a promulgated or filed form



# Scenario 1

XYZ ***Title & Escrow Company*** in Kennewick is performing the closing.

ABC ***Title Insurance*** Co. in Phoenix is providing the commitment on land there.

- (1) Who should issue the CPL – (2) which form?
- (a) ABC Title in Phoenix – WA letter
  - (b) ABC Title in Phoenix – AZ letter
  - (c) XYZ Title in Kennewick – WA letter
  - (d) XYZ Title in Kennewick – AZ letter

# Scenario 1

Answer:

(c) XYZ Title in Kennewick – WA letter

NOTE however: The insurer issues the letter, but the agent can generate the request

But, see next slide



# Scenario 1

**BUT ONLY IF:**

1. XYZ Title is an agent of ABC Title, and
2. If ABC Title allows it (automated system)

And, see next slide...

# Scenario 1

Private escrow, or escrow from title company not an agent of the insuring underwriter, cannot get a letter, or issue the letter

IN THAT SITUATION:

You need a sub-escrow



# Scenario 2

A builder owns its own escrow company and is closing its own transaction. The title work is done by ABC *Title Insurance* Co. Who issues the CPL?

- (a) ABC Title
- (b) The builder
- (c) Either ABC Title or the builder
- (d) None of the above

# Scenario 2

Answer:

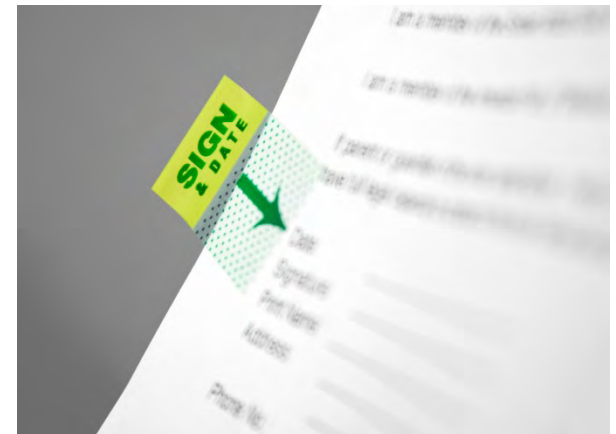
(d) None of the above

**Because:**

No insurer can underwrite the work of a  
unrelated entity

**AGAIN: IN THIS SITUATION**

You need a sub-escrow



# Scenario 3

The title work is being done by an *agent* for ABC *Title Insurance* Co. in Kennewick because the ABC Title has no direct operations here.

The closing is being handled by an ABC Title direct office in Seattle.

Who issues the CPL?

- (a) the Kennewick agent
- (b) ABC Title's escrow in Seattle

# Scenario 3

Answer:

**(b) ABC Title's escrow in Seattle**



## Scenario 4

Can the CPL be issued to the lender with “***its successors and/or assigns***” or “***and affiliates***” after its name?

(a) Yes

(b) No

# Scenario 4

Answer:

Yes

The use of this language is acceptable where allowed by state law – but superfluous since covered by the letter itself



## Scenario 5

Can a CPL be given to a buyer or seller upon request?

(a) Yes

(b) No

# Scenario 5

Answer:

Yes (buyer) No (seller)

Buyer is covered by the ALTA CPL

ALTA declined to promulgate a  
seller form. Check with your  
underwriter

# The Sub-Escrow

- Option if lender hasn't approved a private escrow company as a closer
- Option where different title companies involved
- All lender funds and documents handled by a sub-escrow affiliated with the title underwriter (insuring the property)
- Follow your company's procedures

# Remember!

## The CPL:

- A. Covers the acts and omissions of the closing agent
- B. Provided by the title underwriter ***but only for its agent*** or office
- C. Must be issued in the form approved by the state ***where closing takes place***

# What Are The Most Important CPL Issues And Cases?

- Though these letters have been in all States for at least 40 years, **the body of case law interpreting them remains remarkably small.** But – well represented lenders are aggressively pursuing these claims, so significant new opinions are becoming more frequent.
- Here are some issues to be aware of and the cases that cover them:



# Standing

The closing protection letter ***claim generally follows the loss***, so that ***either*** an originating lender or a successor lender usually has standing to bring the claim if they have suffered any part of an actual loss.

*JP Morgan Chase Bank, N.A. v. FDIC*, No. 09-14891, 2011 WL 2413438 (E.D. Mich. June 10, 2011); *GMAC v. Flick Mortgage Investors, Inc.*, No. 3:09-cv-125, 2011 WL 841409 (W.D.N.C. Mar. 7, 2011)

# Closing Instruction Breaches

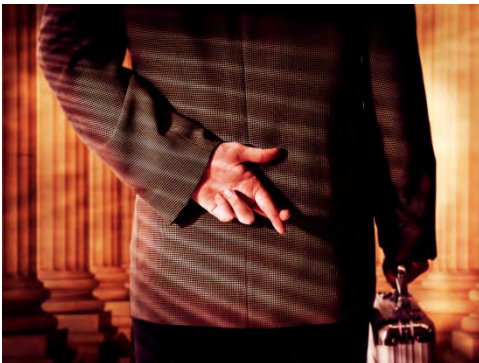
Courts have properly ***limited CPL claims*** based on failures to follow closing instructions ***to*** (1) ***written instructions*** only, (2) only those types of instructions and types of duties that are ***actually spelled out in the CPL's provisions.***



*Federal Agric. Mortgage Corp. v. It's A Jungle Out There, Inc.*, No. C03-3721, 2005 WL 3325051 (N.D. Cal. Dec. 7, 2005)

# Fraudulent or Dishonest State of Mind

For liability to arise under the “fraud or dishonesty” provision, the closing ***agent must have acted with a subjective intent to deceive.***



***Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.***, 655 S.E.2d 269 (Ga. Ct. App. 2007); ***Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.***, 645 S.E.2d 536 (Ga. Ct. App. 2007)



# Loss Causation

No matter how egregious a closing agent's conduct, it gives rise to CPL liability ***only if it actually causes the monetary loss.***



*New Freedom Mortgage Corp. v. Globe Mortgage Corp.*, No. 274864, 2008 WL 3013400 (Mich. Ct. App. Aug. 5, 2008); *First Am. Title Ins. Co. v. Vision Mortgage Corp., Inc.*, 689 A.2d 154 (N.J. Super. Ct. App. Div. 1997)

# Lender Misconduct

A ***lender's mere negligence*** in underwriting or closing the loan generally ***will not defeat a CPL claim***, unless the lender's misconduct ***undermines*** loss causation or ***impairs the underwriter's subrogation rights***. However, if the ***lender's conduct solely caused the loss*** or the ***lender*** itself ***acted fraudulently*** or ***illegally***, the ***underwriter should not be liable*** under the CPL.



*Wells Fargo Bank, N.A. v. Old Republic Nat'l Title Ins. Co.*, 413 Fed. Appx. 569 (4th Cir. 2011); *Lawyers Title v. New Freedom Mortgage Corp.*, 654 S.E.2d 190 (Ga. Ct. App. 2007)

# Actual Losses

If CPL ***does not define actual losses*** to include only the ***lender's settlement funds***, then ***ordinary contract damages principles apply*** – and the lender can recover ***any monetary loss it can prove*** with non-speculative evidence ***was actually caused by the breach***, up to the face amount of the underlying title policy.



*Capital Mortgage Assocs., LLC v. Hulton*, No. NNICV065000413S, 2009 WL 567057 (Conn. Super. Ct. Feb. 13, 2009); *First Am. Title Ins. Co. v. Vision Mortgage Corp., Inc.*, 689 A.2d 154 (N.J. Ct. App. 1997); *Herget Nat'l Bank of Pekin v. USLife Title Ins. Co. of N.Y.*, 809 F.2d 413 (7th Cir. 1987)

# Timely Claim

Some courts have strictly enforced CPL timely claim provisions, while others have grafted state law prejudice requirements into their late notice analysis.



*JP Morgan Chase Bank, N.A. v. FDIC*, Case No. 09-14891, 2011WL 2413438 (E.D. Mich. June 10, 2011); *Primary Residential Mortgage, Inc. v. Guarantee Title Ins. Co.*, No. 4:05CV1115CDP, 2005 WL 2874663 (E.D. Mo. Nov. 1, 2005); *Federal Agric. Mortgage Corp. v. It's A Jungle Out There, Inc.*, No. C03-3721, 2005 WL 3325051 (N.D. Cal. Dec. 7, 2005)

# Underwriter as Insurer

While some courts have applied typical insurance rules of construction to CPLs, others have recognized that the ***CPL itself is not insurance***, and should be treated as ***an ordinary contract***.



*Lawyers Title v. New Freedom Mortgage Corp.*, 655 S.E.2d 269 (Ga. Ct. App. 2007); *American Title Ins. v. Variable Annuity Life Ins. Co.*, No. 14-94-01088-CV, 1996 WL 544431 (Tex. Ct. App. Sept. 26, 1996)