

## TITLE INSURANCE (C) TASK FORCE

Title Insurance (C) Task Force April 5, 2022, Minutes

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## Draft Pending Adoption

Draft: 4/8/22

Title Insurance (C) Task Force  
Kansas City, Missouri  
April 5, 2022

The Title Insurance (C) Task Force met in Kansas City, MO, April 5, 2022. The following Task Force members participated: Eric Dunning, Chair, and Connie Van Slyke (NE); Michael S. Pieciak, Vice Chair, represented by Kevin Gaffney (VT); Jim L. Ridling represented by Jimmy Gunn and Reyn Norman (AL); Michael Conway represented by Peg Brown (CO); David Altmaier represented by Anoush Brangaccio (FL); Vicki Schmidt represented by Craig VanAalst (KS); James J. Donelon represented by Warren Byrd (LA); Grace Arnold represented by Paul Hanson (MN); Chlora Lindley-Myers represented by Marjorie Thompson (MO); Troy Downing represented by Bob Biskupiak (MT); Mike Causey represented by Tracy Biehn (NC); Judith L. French represented by Michelle Brugh Rafeld (OH); Glen Mulready (OK); Michael Humphreys represented by Shannen Logue and Sebastian Conforto (PA); Elizabeth Kelleher Dwyer represented by Brian Werbeloff (RI); Larry D. Deiter represented by Frank Marnell (SD); and Scott A. White represented by Mike Beavers and Chuck Myers (VA). Also participating was: Mike Kreidler represented by Michael Walker (WA).

### 1. Adopted its 2021 Fall National Meeting Minutes

Director Dunning said the Task Force met Nov. 16, 2021. During this meeting, the Task Force took the following action: 1) adopted its Oct. 19, 2021, minutes; 2) adopted its 2022 proposed charges; 3) heard a presentation from AM Best on how the robust housing market drove historic title industry performance; 4) heard a presentation from the American Land Title Association (ALTA) on changes to its homeowners policy and endorsements.

Mr. Gaffney made a motion, seconded by Ms. Biehn, to adopt the Task Force's Nov. 16, 2021, minutes (*see NAIC Proceedings – Fall 2021, Title Insurance (C) Task Force*). The motion passed unanimously.

### 2. Received a Report on How Cyber Wire Fraud Cases Referred by Title Agents are Handled at the VBI

Mr. Myers stated that the Virginia Bureau of Insurance (VBI) is one of the regulatory authorities under the Virginia State Corporation Commission (SCC). Virginia has 356,000 active title agents, 1.6 appointments, and almost 9,000 title appointments. A settlement agent who wants to do real estate closings on property located in Virginia can be licensed as a title agent and registered with the VBI as a real estate settlement agent. According to the Federal Bureau of Investigation (FBI) internet crime report, internet crimes have risen considerably over each of the last five years. There has been an average of 552,000 complaints per year received by the FBI Internet Crime Complaint Center (IC3). The IC3's primary functions are to provide a central hub to alert the public to threats; host a victim reporting portal; partner with private sector and local, state, federal, and international agencies; increase victim reporting via outreach; and host a remote access database for all law enforcement. In 2021 alone, there were 847,000 complaints with losses of \$6.9 billion reported to the IC3.

Virginia is the ninth top state by victim losses. The increase in settlement agent fraud is linked to the strong rise in real estate transactions in the state recently. In just four northern Virginia counties during 2021, 27,000 homes were sold for \$19 billion in 19 days. Multiple parties are involved in a real estate transaction, including the buyer, seller, relator, mortgage lender, and mortgage broker. This provides many opportunities for fraudsters, especially considering that as many as four out of five people are still using unsecured emails. When a compromise occurs, the consumer should first contact their financial institution to attempt to get the stolen assets frozen or recalled. Complaints should then be filed by the financial institution and the consumer with the IC3. The IC3's Recovery Asset Team (RAT) then assists FBI field offices with the possible freezing of funds for victims.

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The VBI usually becomes involved after receiving a complaint from the consumer. In one specific case, the consumer felt the settlement agent should have responded to their confirmation of the email wire. After investigating, the VBI found that the reason for the lack of response was that the confirmation email also went to the fraudster's email address. Business email fraudsters commonly make a slight, and therefore possibly unnoticeable, change to a valid email address. VA Code § 38.2-625 Notice to Commissioner requires an agent or agency to report if they have a cyber breach to the commissioner. In this case, the agency was out just over \$1 million because the fraudster was about to gain access to their entire system and transfer funds out from not just the agency, but the lawyer that owned the agency. All the money was returned to the consumers through either errors and omissions coverage, loans or personal money tied to the agency. In a different case, \$154,000 was wired to pay off a loan. The financial institution was valid, but the beneficiary was not. The account was traced to San Francisco, CA, where it had then been wired again to Indiana, and the agency was able to recover \$82,000. The balance was submitted as an errors and omissions claim. Under VA Code § 55.1-1004 Duties of Settlement Agents, a settlement agent must have an errors and omissions or malpractice insurance policy providing a minimum of \$250,000 in coverage, a blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing a minimum of \$100,000 in coverage, and a surety bond of no less than \$200,000.

### 3. Heard a Presentation on CPL Language

Paul Hammann (First American Title Insurance Company and ALTA) stated that the 2021 closing protection letter (CPL) was adopted by ALTA and became effective on April 2, 2021. It is a revision to the 2018 CPL, which was a revision to the 2015 CPL. The ALTA CPL sets standard and best practices and serves as a model. Most jurisdictions still use the 2015 CPL, which does not contain the new exclusions. The 2021 CPL expressly covers lenders, purchasers, or lessees. Elsewhere in the CPL, the borrower in any refinance transaction is covered under the definition of "you" and "your." If there is only a loan closing, the borrowers are automatically afforded coverage under the definition of "you" and "your" in the letter. For residential deals, the borrower is automatically covered. The CPL covers losses that are solely caused by a failure of the issuing agent or approved attorney to comply with the insureds written closing instructions that relate to: 1) the disbursement of funds necessary to establish the status of the title to the land; 2) the validity, enforceability, or priority of the lien of the insured mortgage; or 3) obtaining any document, specifically required by the insured, but only to the extent that failure to obtain it adversely affects the status of the title or validity, enforceability, or priority of the lien of the insured mortgage. The CPL also covers losses from 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 it affects the status of the title or validity, enforceability, or priority of the lien of the insured mortgage on the title. There are three types of authorizing laws. The CPL may be issued to the seller, buyer, and lender, as is done in Alabama, Arizona, Arkansas, Georgia, Louisiana, Nevada, and Utah. The CPL may be issued to the buyer and lender with the seller allowed but not mandatory. The CPL may be issued to the buyer and lender, where the seller is not included, as is done in the ALTA CPL and some states. Title underwriters are limited to the issuance of title insurance. CPLs are an exception to the monoline limitations.

State-specific requirements include: 1) Notice of Availability (Alabama, Arizona, Arkansas, Colorado, Missouri, and Ohio); 2) the CPL must be issued to the buyer, borrower, lender, and seller on residential transactions (Indiana); 3) the CPL must be issued to the buyer, lender, or seller on residential transactions and may be issued to the buyer, lender, or seller in other transactions (Missouri); 4) the CPL must be offered to any lender, borrower, or seller and any applicant for title insurance (Ohio); 5) the CPL must be issued to proposed insureds (Nebraska); 6) the CPL must be issued to the proposed insured residential lender and may be issued to other proposed insureds (Rhode Island); and 7) the CPL may be issued to the lender or purchaser/seller (Texas).

The 2021 ALTA CPL requirements are as follows:

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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.
  - 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 \$\_\_\_\_\_.
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. The disbursement of Funds necessary to establish the status of the Title to the Land.
    - ii. The validity, enforceability, or priority of the lien of the Insured Mortgage.
    - iii. 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.
  - 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.

For Requirements 1 and 2, the ALTA CPL specifies that the protection is extended to either a secured lender or purchaser/lessee of the Title. In contrast, the Ohio Closing Protection Coverage (CPC) Ohio Title Insurance Rating Bureau (OTIRB) specifies either a lender secured by a mortgage or a listed "Covered Party" with an interest in the land. Ohio allows the seller to be a "Covered Party." The Missouri CPL also allows for sellers to be covered and a separate Seller's CPL to be utilized. Texas ICS: T-51 covers purchasers and sellers, and T-50 covers lenders.

For Requirement 3, the ALTA CPL specifies the defined maximum amount of funds that are to be transmitted to the entity handling the real estate transaction as a requirement. In contrast, the Ohio CPC OTIRB has no such requirement but limits liability to the amount of funds due to or paid for the covered party. The Missouri CPL limits liability to \$5 million for buyers, lessees, and lenders; the alternate version facilitates insertion by the underwriter of the higher or lower amount tailored to the actual transaction. The Texas ICS T-51 (for buyer/seller) only insures above the first \$500,000 of the loss for sellers and buyers, and no maximum is specified (deductible concept). For Requirement 4, the ALTA CPL specifies that the indemnity for fraud, theft, dishonesty, or misappropriation must adversely affect the status of the title or lien of the insured mortgage on the title. In contrast, the Ohio CPC OTIRB specifies, "theft, misappropriation, fraud *or any other failure*," without the requirement for an effect on the Title or lender's lien. The Missouri CPL specifically includes any "theft or fraud" in the purchaser's deposited earnest money or settlement funds, and there is no reference to affect the Title or lender's lien. Texas provides protection for "fraud or dishonesty" of the Issuing Agent in handling seller/purchaser funds and protection for "fraud or dishonesty" of the lender, as it affects the status of the title or validity, enforceability, and priority of the mortgage lien.

The ALTA CPL excludes: 1) certain closing instructions; 2) loss of funds due to bank issues; 3) mechanic's and materialmen's liens; 4) certain defects, liens, encumbrances, and adverse claims connected with the Real Estate Transaction; and 5) "fraud, theft, dishonesty, misappropriation, and negligence" by the CPL recipient, its employees, agent, attorney, or broker. In contrast, in Ohio, failure to comply with inconsistent closing instructions is not excluded. There is also no exclusion of "other matters in connection with the real estate transaction." Although fraud, theft, dishonesty, misappropriation, and negligence are not directly addressed in the Ohio CPC, "matters" created, suffered, assumed, or agreed to by the CPC recipient and your agents/employees are excluded. Missouri has no express exclusion for mechanics' liens but does address fraud, dishonesty, or negligence by your employee, agent, attorney, or broker and "matters" created, suffered, assumed, or agreed to or known are

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excluded. The Texas T-51 for the Buyer or Seller excludes “fraud, dishonesty, or negligence” by the letter recipient; its employee; agent; or attorney; and like Ohio and Missouri, “any matters created, suffered, assumed, or agreed to by or known to you.” The Texas T-50 for the Lender excludes: 1) “fraud, dishonesty, or negligence” by the letter recipient, its employee, agent, attorney, or broker; 2) “any matters created, suffered, assumed, or agreed to by or known to you,” like Ohio and Missouri; and 3) no liability for loss from negligence, fraud, or bad faith of any party other than the issuing agent.

Additionally, ALTA provides exclusions not existing in the Ohio CPC, as Ohio does not state exclusion of loss resulting from: 1) failures of the issuing agent to determine the applicability of documents required by closing instructions; 2) laws regulating lending practices; 3) imposing credit risk retention and securitization standards; 4) construction disbursements; 5) an agent acting as a qualified intermediary for 1031 exchange; or 6) cyber or other fraud that is beyond the scope of the stated indemnification. The Missouri CPL is similar to the scope of the Ohio CPC exclusions. The scope of the Texas T-51 for consumer reimbursement is limited to settlement funds for fraud/dishonesty of the issuing agent, so many of ALTA’s CPL exclusions do not apply. There is greater reimbursement scope with the T-50 for lenders, so more exclusions apply.

Regarding liability exposure, liability for loss in Ohio is limited to the actual loss of funds and is no greater than the amount due to or paid on behalf of a covered party. There is no stated maximum amount and no expressly stated limit lender covered party to the owner of the secured indebtedness at the time of CPC payment. There is also no express cut off for payments under a title insurance policy. Missouri specifies that liability is the amount of settlement fund transmitted, but the default maximum is \$5 million. It does not expressly limit the lender covered party to the owner of secured indebtedness at the time of the CPC payment, and there is no express cut off for payments under a title policy. In Texas, buyer/sellers effectively have a \$500,000 deductible on a claim. For Lenders, there is no stated liability limit.

Regarding a limited agent, under the ALTA CPL, the issuing agent or approved attorney is not the insurer’s agent for closing/escrow, so closing/escrow is outside the scope of the agency. Agency is limited to policy issuance and there are exclusions for fraud, theft, dishonesty, misappropriation, or negligence of other parties to the transaction. There are also exclusions for creditworthiness claims and inadequate security. In contrast, the Ohio CPC does not include a statement as to the limitation of agency scope, but the loss events are narrowly expressed. Also, protection as to compliance with closing instructions is limited to the status of title or the validity, enforceability, or priority of the mortgage lien. Missouri is virtually the same. The Texas Lender T-50 has virtually the same language as the ALTA CPL. However, the Texas T-51 for Seller and Buyer have a very narrow scope protecting settlement/earnest money funds.

Regarding the jurisdiction and forum, the ALTA CPL provides protection when the real estate is in a specified state, the real estate has a choice of law and jurisdiction provision, and class action proceedings are not permitted. Additionally, demand for arbitration may be made by either party where the policy amount of insurance is up to \$2 million and by mutual agreement for the policy amount of insurance over \$2 million. There are not similar provisions stated in the Ohio CPC. The Missouri CPL provides protection only for real estate transactions in Missouri. The Texas T-50 (Lender) provides arbitration provisions that mirror those of the ALTA CPL. Unlike the T-50, the T-51 (Seller/Buyer) limits the corporate contact with the company to the principal place of business in Texas, thus leaving open the position that jurisdiction and choice of law are limited to Texas.

#### 4. Received a Report on How CPLs are Used in Louisiana and Ohio from a Statutory and Regulatory Framework

Mr. Byrd stated that the CPL serves as a contract whereby a title insurer agrees to indemnify a lender or any other parties to a real estate transaction from any actual losses that arise due to any misconduct of the closing title agent or the closing attorney. Some of the misconduct that is considered in the CPL includes, but is not limited to, fraud or dishonesty in the handling of funds or closing documents and the failure of the closing agent to follow

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written closing instructions. Written closing instructions could be as simple as the settlement agent being instructed to deposit certain funds in a specific account and then transfer those funds at a specific time to another account when the transaction is funded. If these instructions are not followed and there is a loss, the loss is covered under the CPL. In most instances, the title insurer that issues the closing protection is the same insurer that will issue either the owner's policy or the lender's policy in conjunction with the real estate transaction.

The relevant statute in Louisiana is R.S. 22:515 (C), which states that a title insurer may issue closing or settlement protection to a person who is a party to a transaction in which a title insurance policy is contemplated being issued. The closing or settlement protection shall conform to the terms of coverage and form of instrument as may be required by the department and may indemnify a person solely against loss of settlement funds because of the following acts of a settlement agent, title insurer's named employee, or title insurance producer: a) theft or misappropriation of settlement funds; or b) failure to comply with instructions when agreed to by the settlement agent, employee, or title insurance producer. The premium charged by a title insurer for this coverage shall be submitted to and approved by the commissioner of insurance. Additionally, a title insurer shall not provide any other coverage, which purports to indemnify against improper acts or omissions of a person with regard to escrow or settlement service.

The written closing instructions should not be inconsistent with any instructions outlined in the title insurance policy's commitment/binder documents. The fees (premium) assessed for the issuance of CPLs have been between \$25 and \$50. Courts have expressed varied opinions on whether the CPL is an insurance product. At the initial use of CPLs, title insurers did not charge a fee for the letter. Based upon La. R.S. 22: 515 (C), the Louisiana legislature recognizes the CPL as providing some form of coverage, and the premium for the CPL must be approved by the commissioner of insurance. Louisiana is a prior approval state. Thus, the form, the letter itself, and the rate must be submitted to the insurance department for prior approval. The written notice of a claim must be received by the company within one year from the transmittal of the fund.

Ms. Rafeld stated that Ohio has had some issues with CPLs being offered. In 2007, at the height of title default locations in the marketplace, Ohio enacted closing protection legislation. The closing protection law requires title insurance companies or the agent to offer closing or settlement protection to all parties associated with the transaction. All CPLs issued are to indemnify the party who requested the protection against misappropriation, fraud, or any other failure to properly disperse settlement closing or escrow funds. Also included is any situation where the title agent fails to comply with written closing instructions. Ohio has found issues with the lack of coverage for injured parties from escrow agents mistakes or fraud. Additionally, past cases have found that some title agents do not always offer closing protection as they are required. In most of those cases, the issue became known through the investigation into an agent misappropriating settlement funds. The investigations revealed that the agents did not offer protection because they did not want the consumer to believe the theft of their money would even be a possibility during the real estate transaction. This raises the question of whether the offering of closing protection should be left to the individual in a position to steal the funds. Other concerns include the timing as to when closing protection coverage is offered in the way the coverage is described by title agents under the current process or methods. There is an extremely low acceptance rate by consumers.

Many within the agent community have expressed that they are not in favor of the mandate to offer closing protection coverage, as it makes them look bad in the eyes of the consumer. For this reason, the importance of closing protection is often downplayed by title agents. Another issue is some title underwriters doing business in the state have tried to exclude cyber theft events from CPL coverage. They have also been reluctant to reimburse consumers affected by business email compromise, believing it falls outside the CPL statute in Ohio. There needs to be education within the underwriter community when the CPL filings are being submitted to the OTIRB because of Ohio's statute. The CPL is to indemnify a party from misappropriations, fraud, or any other failure to properly disperse settlement funds. When an ALTA CPL is filed with the OTIRB, it has been necessary to tell the underwriter

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that Ohio's interpretation of the law is that cyber theft events related to business email compromises are not to be excluded from CPL coverage.

### 5. Held a Q&A Session on the Cyber Wire Fraud Report and Presentations

Birny Birnbaum (Center for Economic Justice—CEJ) asked why CPLs are not covered by errors and omissions policies, thus alleviating the need for an additional fee for coverage under a CPL. Mr. Hammann stated that the fee associated with a CPL is to cover the costs of the CPL issuance, not a premium. The CPL fee is not charged in all jurisdictions.

Peter Kochenburger (University of Connecticut School of Law) urged state insurance regulators not to allow arbitration mandates. Class actions should be restricted to cases where evidence of their need is demonstrated.

### 6. Discussed its 2022 Work Plan

Director Dunning asked that in the interest of time, Task Force members, interested state insurance regulators, and interested parties review the work plan included as part of the materials and submit comments to Anne Obersteadt (NAIC) at [aobersteadt@naic.org](mailto:aobersteadt@naic.org).

The work plan includes: 1) holding a regulator-only meeting with the Consumer Financial Protection Bureau (CFPB); 2) discussion on how the use and language of CPLs varies by state; 3) a presentation on the post-pandemic future of the title insurance industry; 4) a roundtable discussion on rate regulation; 5) a presentation from industry on complications that arise from the required use of plans by some states that include rules or forms tailored to other lines of insurance; and 6) a review of Section 15C of the *Title Insurers Model Act* (#628) to determine if there is a need to make a recommendation to remove the requirement for the on-site review of underwriting and claims practices.

Having no further business, the Title Insurance (C) Task Force adjourned.

SharePoint/NAIC Support Staff Hub/Member Meetings/2022 Spring National Meeting/TitleTF/04-TitleTF