

What Is Title Insurance on Its 150TH Anniversary? Part Two

Description

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Welcome to the second installment of the 3-part series exploring the 150th Anniversary of Title Insurance.

Access and Other Insurance

Some states, such as Alabama, do not explicitly address the rights of access to the land, but this coverage of access is well within the general scope of any definition of title insurance, given that the lack of access might result in an unmarketable title and that access insurance may entail insurance of an easement or other right:

Title insurance policy or policy. A contract insuring or indemnifying against loss or damage arising from any or all of the following existing on or before the date of the policy:

- a. **Defects in or liens or encumbrances on the insured title.**
- b. **Unmarketability of the insured title.**
- c. **Invalidity or unenforceability of liens or encumbrances on the property described in the policy.**
- d. **Lack of priority of liens or encumbrances. Ala. Code Â§ 27-25-3.**

Title insurance means insuring, guaranteeing, or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens or encumbrances upon, defects in or the unmarketability of the title to such property, guaranteeing, warranting or otherwise insuring correctness of searches relating to title to real property or doing any business in substance equivalent. Ariz. Rev. Stat. Ann. Â§ 20-1562(8).

Title insurance means insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage sustained by reason of liens or encumbrances, or defects in the title to said property, or invalidity or unenforceability of any liens or encumbrances thereon, or incorrectness of searches relating to the title to real or personal property. Cal. Ins. Code Â§ 12340.1.

A domestic company may insure identity, due execution and validity of any note or bond secured by a mortgage, identity, due execution, validity and recording of a mortgage, and identity, due execution and validity of evidences of indebtedness issued by this state, political subdivision or districts or any private or public corporation. Cal. Ins. Code Â§ 12390.

Casualty insurance is prohibited. A policy or guarantee may not be issued without regard to the possible existence of adverse matters or defect. Fla. Stat. Â§ 627.784.

Each title insurer may engage in title insurance business and each domestic title insurer also may insure identity, due execution, and validity of any note or bond secured by mortgage, identity, due execution, validity and recording of such mortgage and identity, due execution and validity of evidences of debt issued by this state, a political subdivision or district, or by an private or public corporation. Haw. Rev. Stat.Â§ 431:20-105.

Current State of Closing Protection Letters and Escrow

Many states, such as in South Carolina as provided below, statutorily authorize CPLs, and only one state, New York, (State of N.Y. Ins. Depâ??t Circular Letter No. 18 (Dec. 14, 1992)) prohibits CPLs:

(A) Notwithstanding Section 38-5-30, 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 will be issued but may not provide any other coverage that purports to indemnify against improper acts or omissions of a person with regard to settlement or closing services.

(B) Closing or settlement protection may indemnify a person only against loss of closing or settlement funds because of one of the following acts of a settlement agent under the terms and conditions of the closing or settlement protection:

â??(1) theft or misappropriation of settlement funds in connection with a transaction in which a title insurance policy will be issued by or on behalf of the title insurer issuing the closing or settlement protection, but only to the extent that the theft 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; or

(2) failure to comply with the written closing instructions when agreed to by the settlement agent, title agent, or employee of the title insurer, but only to the extent that the failure to follow the instructions relates to 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.

(C) A premium charged by a title insurer for each party receiving closing or settlement protection must be submitted to and approved by the department in accordance with this article and must not be subject to any agreement requiring a division of fees or premiums collected on behalf of the title insurer. S.C. Code Ann. Â§ 38-75-1010.

Administrative Letter 1995-8 of the Virginia State Corporation Commission Bureau of Insurance states that closing protection letters must limit coverage to matters affecting the condition of title or status of any lien and must be filed with the Bureau of Insurance. Virginia Administrative Letter 2017-04 (November 3, 2017) instructs title insurance companies imposing a charge for a Closing Protection Letter to treat the charge as insurance premium (for which premium tax must be paid).

The ALTA State of Virginia Survey stated: â??The Bureau, however, later approved Virginia Land Title Associationâ??s (â??VLTAâ??) 11/01/95 Insured Closing Protection Letter (which was based on the American Land Title Associationâ??s 3/27/87 form). Insurers who submit the latest version of the ALTA Closing Protection Letter will have it approved for use provided it is modified to comply with Virginia statutes and the Bureauâ??s regulations.â??

Title insurers should use caution in submitting closing protection letters for approval so as to avoid noncompliance with the Bureau's Administrative Letter 1995-8. In particular, any provision that purports to extend coverage to assignees or warehouse lenders would not be in compliance based upon those parties not being named in the loan documents and therefore not being affected by title issues. Moreover, although arbitration clauses are permissible, the provision must state that the decision is not binding. Â§38.2-312, Code of Virginia, and Administrative Letter 1998-12. Administrative Letter 2017-04 advises insurers that any fee imposed for the issuance of a closing protection letter must be considered premium and must be reported as direct premiums written, not as other income.â•

A few states, including California, Florida, Nebraska, and Utah, impose liability on the title insurers for certain escrow defalcations by their title insurance agents, such as is provided under California law:

(a) If an underwritten title company is placed into bankruptcy, receivership, or conservation by the commissioner, each title insurer operating under an underwriting agreement with the underwritten title company during the six months prior to the earliest of the conservation, bankruptcy, or receivership shall be liable for its proportionate share of the commissioner's costs and any escrow and sub-escrow account shortages as determined by the calculations set forth in subdivisions (b) and (c).

(b) If, during the six months prior to the earliest of the establishment of a conservation, bankruptcy, or receivership under subdivision (a), the underwritten title company was authorized by underwriting agreements to issue title policies for more than one title insurer, the liability of each title insurer is determined by multiplying the amount of the total escrow and sub-escrow shortages, as well as the costs, and expenses, as set forth in subdivision (c), by that title insurer's percentage of the underwritten title company's net premiums for policies issued by each title insurer during the 12-month period preceding the earliest of the establishment of the conservation, bankruptcy, or receivership, with each title insurer's liability pursuant to this subdivision to be referred to as its proportionate share. Cal. Ins. Code Â§ 12376.

Some states, such as California, Hawaii, Idaho, Vermont, and Wyoming, authorize insurance with respect to promissory notes, such as appears in California law:

Every domestic title insurer may issue title policies and may also insure:

- The identity, due execution, and validity of any note or bond secured by mortgage.
- The identity, due execution, validity, and recording of any such mortgage.
- The identity, due execution and validity of evidences of indebtedness issued by this State, or by any political subdivision or district therein, or by any private or public corporation. Cal. Ins. Code Â§ 12390.

A majority of states, such as Ohio and Pennsylvania, prohibit the title insurer from guaranteeing debt:

Business prohibited

A title insurance company shall not engage in the business of guaranteeing the payment of the principal or the interest of notes, bonds, or other obligations secured by mortgages upon real property. A title insurance company shall not engage in the business of guaranteeing the completion of improvements in this state. Notwithstanding section 1735.01 of the Revised Code,

a title guarantee, and trust company may not guarantee the collection of interest and principal of mortgage loans. Ohio Rev. Code Ann. Â§ 3953.09.

Most states prohibit guarantees of mortgages:

Prohibition upon guaranteeing mortgages

A title insurance company shall not, in any manner whatsoever, guarantee the payment of the principal or the interest of bonds or other obligations secured by mortgages upon real property. Pa. Stat. Ann. tit. 40, Â§ 910-9.

Usury

A few states do not allow issuance of Usury Endorsements (e.g., Idaho, o Admin. Code r. 18.01.25.005.06,.Kansas, and Missouri, and such endorsement is not approved in Delaware, Florida, New Jersey, New Mexico, Oregon, Pennsylvania, and Texas), prohibit issuing Zoning Endorsements (e.g., Texas), or prohibit insuring around outstanding enforceable liens (e.g., Idaho Admin. Code r. 18.05.01.012; Idaho Code Ann. Â§ 41-2708(2 and Texas).

Mechanics Liens

Texas Procedural Rule P-8.a requires the following promulgated mechanicâ??s lien exception on Ownerâ??s Policies issued in an amount to include the cost of immediately contemplated improvements:

â??Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of _____ County, Texas, prior to the date hereof.â?•

AND THE FOLLOWING â??LIABILITYâ?• PARAGRAPH:

â??Liability hereunder at the date hereof is limited to \$_____. Liability shall increase as contemplated improvements are made, so that any loss payable hereunder shall be limited to said sum plus the amount actually expended by the Insured in improvements at the time the loss occurs. Any expenditures made for improvements, subsequent to the date of this policy, will be deemed made as of the date of this policy. In no event shall the liability of the Company hereunder exceed the face amount of this policy. Nothing contained in this paragraph shall be construed as limiting any exception or any printed provision of this policy.â?• Tex. P. R. P-8.a.

Texas Procedural Rule P-8.b requires the following promulgated mechanicâ??s lien exception on mortgages given in whole or in part for the cost of improvements:

â??Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of _____ County, Texas, prior to the date hereof.â?•

AND THE FOLLOWING "PENDING DISBURSEMENT" PARAGRAPH:

"Pending disbursement of the full proceeds of the loan secured by the lien instrument set forth under Schedule A hereof, this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to, the title up to the face amount of the policy. Nothing contained in this paragraph shall be construed as limiting any exception under Schedule B, or any printed provision of this policy." Tex. P. R. P-11; Tex. Ins. Code Ann. Â§ 2502.003.).

The ALTA 32 Series endorsements are designed to be used in transactions where the construction loan mortgage does not or may not have initial priority or priority as to subsequent advances, such as where (1) under state law a mechanic's lien generally has the priority or parity with a construction loan mortgage; (2) the priority is lost because of the early commencement or prior execution of a contract; (3) the priority is lost because the disbursements are not obligatory or because the disbursements are made after receipt of a notice from the mechanic's lien claimant; (4) the priority is uncertain because of ambiguity relating to the early commencement, such as whether there in fact has been an early commencement or whether the improvements are made pursuant to an entirely separate contract; (5) the disbursements are not made for construction as required by law; (6) a notice of commencement is recorded prior to the recordation of the construction loan mortgage; or (7) in the view of the title insurer, the transaction or mechanic's lien risk is so large that the mechanic's lien risk must be managed by the coverage of the ALTA 32 Series endorsements. This method of providing mechanic's lien coverage has become more prevalent since 2007-2008. The ALTA 32-06 (and ALTA 32) covers subcontractors of those parties being paid, but the ALTA 32.1-06 (and ALTA 32.1) and ALTA 32.2-06 (and ALTA 32.2) do not. Each of the ALTA 32 Series endorsements include the following:

- deletion of Covered Risk 11(a) of the 2006 ALTA Loan Policy (or Covered Risk 11.a. of the 2021 ALTA Loan Policy)
- definition of "Date of Coverage" (the date through which mechanic's lien coverage is provided as set forth in the endorsement), "Construction Loan Advance," and "Mechanic's Lien"
- three insuring provisions in Section 3:
 - insurance against the invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage
 - insurance against the lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B
 - insurance against the lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before Date of Coverage over any Mechanic's Lien if notice of the Mechanic's Lien is not filed or recorded in the Public Records, subject to the limitations set forth in each Construction Loan Endorsement
- coverage of Mechanic's Liens not recorded in the Public Records in Section 3.c of each ALTA 32 Series endorsement is as follows:

ALTA 32-06 and ALTA 32:

3. c. but only to the extent that the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

ALTA 32.1-06 and ALTA 32.1:

3. c. but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed has been made by the Company or by the Insured with the Company's written approval.

ALTA 32.2-06 and ALTA 32.2:

3. c. but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed has been made by the Insured or on the Insured's behalf on or before Date of Coverage.

The ALTA 32 and ALTA 32-06 Section 3.c insure only with respect to work performed before submission to the lender for which payment is intended to be made, and thus the Date of Coverage under the ALTA 33-06 will not include all work before that date or work by a contractor that is not intended to be paid. The ALTA 33-06 also will not include billings or work if the lender does not fund for that amount because of any dispute over the billings or work. The ALTA 32.1 or ALTA 32.1-06 and the ALTA 32.2 or ALTA 32.2-06 will not extend coverage to payments made by the owner or the contractor. The ALTA 32.2-06 or ALTA 32.2 may be modified to refer to direct payment by another party such as the owner or original contractor such as: "but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed has been made by the Insured or by the Contractor on or before Date of Coverage." • Section 3 could be amended to cover risk for work done by the seller or by the borrower without loan funding by the Insured lender; otherwise, such coverage is not given by the ALTA 32 Series endorsements. Section 4.b. could be modified: to the extent that the Mechanic's Lien claimant was not directly paid by the Insured or by the Contractor.

In the alternative, the lender may request a CLTA Endorsement 122.1A when available to cover any claim for services, labor, material, or equipment furnished before a stated date, no matter who paid, such as:

Notwithstanding Exception delete if no separate exception in Schedule B of the policy, the Company insures against loss or damage sustained by the Insured by reason of the lack of priority of the lien of the Insured Mortgage over any lien for services, labor, material or equipment affecting the Title and arising from construction of a work of improvement on the Land, but only to the extent that such lien is for services provided, labor performed, or materials or equipment currently being provided _____ (the "Mechanics Lien Coverage Cut-Off Date").

The following Schedule B Exception must be included in the Preliminary Report/Title Commitment and the Loan Policy in tandem with the issuance of the CLTA 122.1A:

Any lien for services, labor, material or equipment that arises from services provided, labor performed, or material or equipment furnished on or after (the "Mechanics" Lien Coverage Cut-Off Date.)

Note: the "Mechanics" Lien Coverage Cut-Off Date shown in the above-referenced Schedule B exception must be the same as the "Mechanics" Lien Coverage Cut-Off Date shown in the CLTA 122.1A endorsement issued with the policy.>

(e) consistency with the limitations on coverage for Mechanic's Liens not recorded in the Public Records are the exclusions in Section 4 of the ALTA Construction Loan Endorsements. Each ALTA 32 Series endorsement excludes coverage for:

ALTA 32-06:

4. "any Mechanic's Lien arising from services, labor, material, or equipment:
 - a. furnished after Date of Coverage; or
 - b. not designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

ALTA 32:

4. "any lien or claim of lien arising from services, labor, material, or equipment:
 - a. furnished after Date of Coverage; or
 - b. not designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

ALTA 32.1-06:

4. "any Mechanic's Lien arising from services, labor, material, or equipment:
 - a. furnished after Date of Coverage; or
 - b. to the extent that the Mechanic's Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval.

ALTA 32.1:

4. "any lien or claim of lien arising from services, labor, material, or equipment:
 - a. furnished after Date of Coverage; or
 - b. to the extent that the Mechanic's Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval.

ALTA 32.2-06:

4. "any Mechanic's Lien arising from services, labor, materials, or equipment:

- a. furnished after Date of Coverage; or
- b. to the extent that the Mechanic's Lien claimant was not directly paid by the Insured or on the Insured's behalf.

ALTA 32.2:

4. any lien or claim of lien arising from services, labor, materials, or equipment:
- a. Furnished after Date of Coverage; or
- b. To the extent that the Mechanic's Lien claimant was not directly paid by the Insured or on the Insured's behalf.

The ALTA 32, ALTA 32.1, and ALTA 32.2 limit coverage in accordance with the *McGirt* case by excluding mechanic's liens that might original under Tribal law, with a definition of "Mechanic's Lien" that is:

"Mechanic's Lien": Any statutory lien or claim of lien under State law, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.

Monoline Restrictions

An understanding of title insurance requires the recognition that title insurers are monoline insurers and may not engage in other lines of insurance. A majority of the states have a monoline restriction, as does the NAIC Title Insurers Model Act. Those states and jurisdictions include Alabama, Alaska, Arizona, Arkansas, California (expressly extraterritorial), Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York (expressly extraterritorial), Ohio, Oklahoma, Oregon (in Oregon only), Pennsylvania, South Dakota, Tennessee, Texas, Utah (if order, applicable outside of state), Virginia, Washington, Wisconsin (possible extraterritorial application), and Wyoming.

The monoline approach is used in much of the United States, in contrast to the multiline insurance practiced in the United Kingdom and the remainder of Europe.

A monoline company insures under only one line of insurance and does not insure other types of risk. Consequently, property, casualty, and mortgage guaranty companies that provide mortgage impairment products relating to the priority of a residential lender's mortgage are said to violate the monoline limitations (and related title insurance regulations) of these states. The monoline limitation may apply only to conduct within that state, or it may apply nationally, so an insurer cannot violate the monoline restraints in any other jurisdiction and then conduct business in the host state. The reasoning of the monoline restriction is that

- (1) some lines of insurance require specialized expertise, and these will be maintained best by separate lines of insurance;
- (2) some lines contain higher and lower risks, and it is best to maintain the separateness of the risks; and

(3) given varied risks, the reserves can best be maintained by retaining separate lines for the different types of risk.

Typifying the monoline statute is Louisiana:

A. (1) No insurer that transacts any class, type, or kind of insurance other than title insurance shall be eligible for the issuance or renewal of a license to transact the business of title insurance in this state.

(2) No title insurance shall be transacted, underwritten, or issued by any insurer transacting or licensed to transact any other class, type, or kind of business. La. Rev. Stat. Ann. Â§ 22:515.

California law imposes a multistate monoline restriction and prohibits the title insurer from violating its limitations by engaging in any other lines of insurance anywhere in the United States:

An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof. Cal. Ins. Code Â§ 12360.

The monoline stricture that reaches nationally is known as the "Appleton Rule." Dr. Nelson R. Lipshutz, "The Role of the Monoline Requirement in Assuring Title Insurance Effectiveness," ALTA, 2004. New York's monoline law requires that insurers doing business in New York comply with the monoline requirements for all business nationally (named the "Appleton Rule" because the rule was adopted when Henry Appleton was Deputy Superintendent of Insurance):

Additional requirements for foreign or alien insurer's license

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(c) No foreign insurer shall be licensed to do in this state any kind of insurance business, or combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No foreign insurer shall be authorized to do business in this state if it does in this state or elsewhere any kind of business, other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is licensed to do in this state.

(d) No alien insurer shall be licensed to do in this state any kind of insurance business, or any combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No alien insurer shall be authorized to do an insurance business in this state if it does anywhere within the United States any kind of business other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state.

(e) Except as otherwise specifically provided in this chapter no foreign insurer and no United States branch of an alien insurer shall be or continue to be authorized to do an insurance business in this state if it fails to comply substantially with any requirement or limitation of this chapter, applicable to similar domestic insurers hereafter to be organized, which in the

judgment of the superintendent is reasonably necessary to protect the interests of the people of this state.

(f) No foreign insurer and no United States branch of an alien insurer which does outside of this state any kind or combination of kinds of insurance business not permitted to be done in this state by similar domestic insurers hereafter organized, shall be or continue to be authorized to do an insurance business in this state, unless in the judgment of the superintendent the doing of such kind or combination of kinds of insurance business will not be prejudicial to the best interests of the people of this state. N.Y. Ins. Law Â§ 1106.

This application of an extraterritorial monoline restriction actually seems to be inherent in most monoline limits, unless specifically addressed by the law, since otherwise a multiline insurer, engaged in practices in other states that would be considered extra hazardous if conducted in the host state, may undertake those practices, such as mortgage guaranty, in other locations and incur the same risk profile as a multiline insurer in the host state.

Application of Monoline Restrictions

a. Warranties

Title insurance has always competed against warranties of title, title searches, and title examinations, with or without abstracts of title. The advantage of title insurance over these alternatives has long been argued: a title insurer's deep pocket generally exists to pay a title insurance claim, but a deep pocket does not necessarily exist in a claim against the warrantor, searcher, or examiner, although the warrantor may be financially strong, or the searcher or examiner may have malpractice or errors and omissions insurance, subject to deductibles, maximum liability, and term of coverage.

Warranties, with agreed-upon limits of liability, may be structured on the basis of an abstract of title, which may be limited in the time or nature of the search, or may be based upon information in the real property records, on a credit report, or combination of these alternatives. In some jurisdictions, to qualify as an abstract, however, the list may be required to include all recorded documents in the chain of title. The warranty may be backed by an Errors and Omissions Policy or other property and casualty policy that may inure only to the warrantor. The fact that an insurance product is labeled as a warranty does not prevent it from being considered title insurance if it meets the statutory definition as set forth above. Donald Bryan, Acting Comm'r of Banking & Ins., Bulletin No. 05-05, N.J. Ins. Notices and Bulletins (Mar. 9, 2005). As understood by the Department, mortgage impairment protection products, whether or not they use the term insurance or warranty in their name, purport to insure the validity or the priority of the insured mortgage. Be advised that the fact that a mortgage impairment product only covers second or third mortgage lenders does not change the Department's position that such products are title insurance. Any product that, in essence, insures against loss by reason of defective title or incorrect title searches is title insurance, regardless of the name under which it is marketed to consumers. Paula A. Flowers, Comm'r, Bulletin, Tenn. Notices and Bulletins (Apr. 8, 2004).

In the last 30 years, three additional products were offered that had competed with title insurance: Title Option Plus (TOP), Radian Lien Protection (RLP), and Mortgage Impairment Insurance (MII). The essence of the RLP and MII products was to require that a legal description (such as through the last deed, as one alternative) be secured, an affidavit of the borrower be used, an exception be made to liens on the credit report, and the parameters of the loan programs be acceptable (such as the loan-to-

value ratio (LTV), the FICO credit score, the limitations on late payments within the last 12 months, the type of residential property, and the existing ownership only). The crux of RLP and MII insured against liens that were not shown on the credit report. The TOP program was based on a warranty.

b. Title Option Plus (TOP)

The Title Option Plus program, which was subsequently discontinued, was explained in *Norwest v. State* in 1997:

The TOP program is embodied in three interrelated contractual agreements furnished to Freddie Mac in lieu of a traditional title policy or attorney's title opinion¹.

The first contract, the Master Agreement, is a "warranty" by NMI the lender, Norwest Mortgage, Inc. to Freddie Mac and Fannie Mae that those mortgages NMI sells to Freddie Mac or Fannie Mae are secured by a first lien. NMI's contractual undertakings under the Master Agreement protect Freddie Mac against any title claims or problems, including non-record risks, that may affect Freddie Mac's interest in the loans it has purchased. If a defect appears and cannot be cured, NMI agrees to repurchase the loan, if the claim cannot be otherwise resolved. (It is noted that NMI only warrants the title and priority of a lien, when the title search and title report is performed by ATI the title insurance agent, American Land Title Company, doing business as ATI Title Company, a wholly-owned subsidiary of NMI).

The second contract is a title condition report prepared by ATI and furnished to NMI to verify that, as a matter of public record, NMI's mortgage is secured by a first lien. ATI remains liable to NMI for any on-record defects that are missed in the title search, while NMI assumes the risk of off-record defects.

The third contractual arrangement is the Guarantee Agreement from Norwest the guarantor, Norwest Corporation, the bank holding company which owned NMI to Freddie Mac under which Norwest guarantees NMI's title-related obligations to Freddie Mac. *Norwest Corp. v. State*, 253 Neb. 574, 571 N.W.2d 628 (1997).

TOP was generally, but not universally, determined to be title insurance transacted, sold, or marketed in violation of applicable insurance laws in most, but not all, jurisdictions that administratively or judicially considered it. See *Norwest Corp. v. State*, 253 Neb. 574, 571 N.W.2d 628 (1997) (TOP is insurance); *Division of Ins. v. Norwest Corp.*, 1998 SD 61, 581 N.W.2d 158 (1998) (TOP is title insurance); *cf. Lawyers Title Ins. Corp. v. Norwest Corp.*, 254 Va. 388, 493 S.E.2d 114 (1997) (TOP is not insurance). Numerous state insurance departments considered TOP:

STATE	TITLE OPTION PLUS (TOP) CONSIDERATION
Colorado	The Colorado Division of Insurance concluded that TOP is title insurance.
Connecticut	The Connecticut Department of Insurance concluded that TOP is title insurance.
Idaho	The Idaho Attorney General concluded TOP is title insurance; a later ruling by a hearings officer determined that TOP is not title insurance.
Illinois	The Illinois Department of Financial Institutions concluded that TOP is title insurance.

STATE	TITLE OPTION PLUS (TOP) CONSIDERATION
Iowa	The Iowa Insurance Division concluded that TOP is title insurance.
Kansas	The Kansas Insurance Department and hearing determined that TOP is title insurance.
Minnesota	The Minnesota Commissioner of Commerce concluded that TOP is not title insurance.
New York	The New York State Superintendent of Financial Services concluded that TOP is title insurance.
North Carolina	The North Carolina Attorney General concluded that TOP is title insurance.
Oklahoma	The Oklahoma Insurance Commissioner concluded that TOP is title insurance.
Oregon	The Oregon Department of Consumer and Business Services, Insurance Division concluded that TOP is title insurance.
Pennsylvania	The Pennsylvania Department of Insurance concluded that TOP is title insurance, and a later hearing was conducted.
Tennessee	The Tennessee Department of Commerce and Insurance concluded that TOP is title insurance.
Texas	The Texas Department of Insurance suggested that TOP is title insurance.
Utah	The Utah Insurance Department concluded that TOP is title insurance.

c. *Radian Lien Protection (RLP)*

RLP was offered as mortgage pool insurance (in a Mortgage Pool Insurance Policy) for an entire mortgage pool on second mortgages, home equity mortgages, and refinances by existing owners at a fixed price of \$275. The coverage for monetary liens was limited to 50 basis points (0.5 percent of the initial principal) on the mortgage pool. At one time, the program required that loans must be made to borrowers with a FICO credit score of 570 or greater, the loan amounts were not to exceed \$650,000, and the maximum LTV/CLTV (combined loan-to-value ratio) could not exceed 100 percent on loans up to \$650,000. RLP, similar to some guarantees and limited-coverage home equity policies, did not cover all of the defects in the title (nor have a number of other home equity products) and did not provide for defense. Standard & Poor's concluded that RLP was an acceptable substitute on the loans it rated.

RLP was a limited-coverage policy, and thus did not include many of the provisions that normally appeared in an ALTA policy. The differences from the ALTA policies and endorsements were not unique to RLP; RLP was similar to some of the other home equity products used by title insurers. Some of the limitations to the coverage under RLP included the following:

- RLP did not insure:
 - that the borrower owns the land.
 - against an invalid mortgage because of the failure of the borrower's spouse (of a heterosexual or same-sex marriage) to join in the mortgage.
 - against liens recorded after the mortgage.
 - the location of a house with the address on the land.
 - the priority over later filed environmental protection liens.

- against survey matters, such as boundary conflicts and encroachments.
 - against lis pendens or pending suits claiming the title.
 - the access to the land.
 - against the damage due to the use of the surface for mineral development.
 - that the mortgage was valid.
 - mortgages, unless the mortgages were duly recorded within 48 hours after the funds were advanced.
 - against defective recording of the mortgage.
 - against forgery or impersonation causing the mortgage or title to be invalid.
- RLP required the lender to:
 - advance money to pay taxes.
 - restore any damaged property.
 - RLP did not promise to hire a lawyer as to the insured matters.
 - RLP had various parameters, such as credit scoring, no purchase money loans, and aggregate loss limits. Aggregate loss limits were not applicable to title insurance home equity products.
 - RLP protected only the named insured.

States considering RLP to be title insurance included Alabama, Connecticut, Florida, New Mexico, North Carolina, Pennsylvania, and Texas. Illinois, however, concluded that Radian Guaranty, Inc. (Radian) could sell its RLP if it did not market the product as title insurance, if the claims would be made only if there was a deficiency balance, and if Radian did not sell other mortgage pool products.

The California Insurance Commissioner subsequently issued a cease and desist order that prevented Radian, Amerin Guaranty Corporation, and RadianExpress.com, Inc., from marketing, soliciting, negotiating, and selling the mortgage pool insurance policies (more commonly referred to as the RLP program), which the Insurance Commissioner found to be title insurance under California law and to be an improper combination of mortgage guaranty and title insurance, both of which are subject to monoline limitations. The California monoline limitations have extraterritorial effect and would prevent Radian from conducting business in California if it issued such insurance in any other state.

An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof. Cal. Ins. Code Â§ 12360.

The court notes, “the RLP policy language providing coverage for undisclosed liens mirrors the foregoing statutory and case law definition of title insurance. The insuring clause in the RLP provides that it insure against “Loss sustained by reason of the Default.” Two distinct types of losses are theoretically contemplated under the RLP. As already noted, “Loss,” as defined by the RLP, includes a traditional mortgage guaranty component—reimbursement to the lender for financial loss due to default of the borrower on a mortgage lien secured by real estate. However, “Undisclosed Lien Loss” is also included within the definition of “Loss.” The RLP defines loss arising from an “Undisclosed Lien” as meaning “any lien or similar encumbrance which (i) takes priority over the position of a Mortgage Agreement and (ii) was not disclosed on the Ownership and Legal Description Verification Report (with Tax Status Report), the Mortgage Lien Report, the Borrower’s Application or the Borrower’s Affidavit obtained by the Insured prior to the consummation of such Mortgage Agreement and (iii) was not otherwise known to the Insured prior to the Consummation of

such Mortgage Agreement.â??â?• The Court of Appeal of California upheld the cease and desist order. *Radian Guar., Inc. v. Garamendi*, 127 Cal. App. 4th 1280, 26 Cal. Rptr. 3d 464 (2005), time for granting or denying review extended by 2005 Cal. LEXIS 7385 (June 24, 2005), review denied by 2005 Cal. LEXIS 7999 (Cal. July 20, 2005).

a. *Mortgage Impairment Insurance (MII)*

This type of insurance occasionally insures the lender against failure by the lender to have sufficient title insurance, not due to the lenderâ??s willful fault. Some of the MII policies insure matters that may be asserted to be covered by title insurance. For example, some policies may insure against loss resulting from

- (1) failure to pay real estate taxes;
- (2) error, neglect, omission, or breach of duty in actual performance or failure to perform activities, including obtaining a tax bill showing ownership, review of credit bureau report showing liens and property address, or ownerâ??s affidavit relating to title or impairment by discovery of a previously unknown property interest in the collateral;
- (3) perfection of a second lien mortgage that could not be obtained despite timely filing of the mortgage;
- (4) loss by reason of defective title, if the insured required title insurance; and
- (5) impairment of lien, due to an unknown interest, if the lender required a tax bill showing ownership, a credit report showing liens and property address, and/or an ownerâ??s affidavit of title, and presented the (second) mortgage for recording.

Typically, this type of insurance was offered on junior home equity loans, but it was equally adapted to first lien refinances. It was sometimes offered on a surplus-line basis. Some of the policies are written as master policies with a stated maximum limit of liability. Some policies are called equity or lending activities policies. The terms used in such a policy often include â??lien priority,â? â??lending activities,â? â??mortgage impairment,â? and â??undisclosed liens.â? This coverage should be contrasted with collateral protection insurance, which provides insurance because of the consumerâ??s failure to provide evidence of insurance and excludes title insurance. 815 Ill. Comp. Stat. 180/5; N.J. Stat. Ann. Â§ 17:16V-2; W. Va. Code Â§ 46A-3-109a.

Often, the language used in mortgage impairment policies was rather obviously title insurance. Examples include the following:

- â??â?guarantees the lenderâ??s second lien positionâ?!.â?•
- â??Coverage is extendedâ?to loss incurred by the Assuredâ?due to impairment to the Assuredâ??s Second Position Mortgage Interestâ?!. The Mortgage Interest must have been impaired due to previously unknown Mortgage Interest or lien held by one who is not liable on the Assuredâ??s Second Position Mortgage.â?•
- â??Your inability to enforce your rights under a second mortgage loan, due to the existence of a superior lien of which you were unaware; solely as a result of you not performing a standard title search prior to recording your lien or encumbrance on property against which you hold a second mortgage interest.â?•

- Insures the lender's second mortgage position.
- Indemnifying the Named Insured against loss caused or occasioned by an act or omission of the Borrower, whether fraudulently or not, or a servicer, including a failure to disclose a lien or mortgage position secured by Borrower's property.
- Insures your mortgagor's representations regarding the non-existence of mortgages, liens, or Judgments, which would impair your intended second mortgage position.
- Loss means the amount of your second mortgage interest, after foreclosure and sale of the property, you are unable to recover from the proceeds of said sale because of the existence of an encumbrance not known or disclosed to you as required by your loan application and Property Owner Affidavit.
- WE will pay YOU for Loss, in excess of the deductible amount that is the result of a Foreclosure provided the Superior Lien was recorded before the closing of the Second Mortgage Loan; and YOU had no knowledge of the Superior Lien at the time of the closing of the Second Mortgage Loan because YOU made an intentional decision not to perform a standard title search prior to closing the Second Mortgage Loan.

A number of states rejected MII products because they were construed as title insurance. Those states include Alabama, California, Connecticut, Florida, Illinois, Kansas, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, and Texas.

The ALTA filed a complaint in the U.S. District Court for the Northern District of California under Cause Number C 05 4354 on October 26, 2005, in connection with the issuance of mortgage impairment insurance and sought a determination that the mortgage impairment/lien priority insurance of the defendants constituted title insurance or illegal bundling of title insurance risks that is prohibited because the defendants are not licensed as title insurers and also sought injunctive relief. The ALTA alleged:

An insurance company that is not a licensed title insurer cannot issue title insurance and cannot provide insurance coverage for a title insurance risk. Indeed, in California, as in the majority of states, title insurance is legislatively mandated to be mono-line, meaning that a licensed title insurer cannot be licensed to issue any other class or line of insurance. Similarly, these mono-line statutes in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming clarify and confirm that an insurance company not licensed as a title insurer cannot issue title insurance or, in any way, provide insurance coverage for a title insurance risk. The risk of loss arising out of undisclosed liens or encumbrances senior to the insured mortgage is commonly referred to in the title insurance industry as lien priority insurance and has always been categorized as title insurance. The Departments of Insurance of at least thirty (30) states have confirmed that mortgage impairment/lien priority insurance constitutes title insurance and can only be issued by a licensed title insurer. These state determinations consist of Attorney General Opinions, Insurance Bulletins, Cease and Desist Orders and other formal communications. The Court of Appeal for the State of California recently rendered its published opinion confirming that mortgage impairment/lien priority insurance is title insurance and can only be issued by licensed title insurers. The Department of Insurance of the States of Indiana, New Jersey, North Carolina, and Tennessee have issued formal Insurance Bulletins confirming, under their respective state laws, that mortgage/lien

priority insurance is title insurance and can only be issued by licensed title insurers.

The complaint joined as defendants the following parties and alleged:

- Great American Insurance Company, Great American Assurance Company, and Agricultural Insurance Company (collectively, Great American) licensed as property and casualty insurers, issue insurance policies Form 5701 and Form 5701c (Great American Policies) as errors and omissions policies, but include insurance against loss arising from senior undisclosed liens or encumbrances. The Great American Policies are marketed, offered, and/or sold under various names, including Premier Equity Protector.

Form 5701 includes or bundles mortgage impairment/lien priority insurance with a standard errors and omissions policy via the use of endorsements to the standard policy with endorsements such as Coverage G Identification of Superior Positions, Coverage J Validation of Owners Affidavit, and Coverage N Affiliated Title Search Activities.

Endorsement Coverage G revises the definition of mortgage lending activities to include the process of identifying all legally superior rights, encumbrances and security positions to the mortgage agreement.

Endorsement Coverage J deletes the exclusion relative to the failure to determine the accuracy of the Owner's affidavit. Through this endorsement, vesting coverage is given.

Endorsement Coverage N revises the definition of mortgage lending activities to include title searches.

Form 5701c bundles mortgage impairment/lien priority insurance with the definitions of the risks insured under the policy. The policy defines mortgage lending activities as the process of identifying all legally superior rights, encumbrances and security positions to the mortgage agreement via the credit bureau report; or all professional services of the Insured or an affiliate of the Insured in performing or failing to perform courthouse searches or other record searches in conjunction with the origination of a mortgage agreement; or the process of filing the mortgagor's security interest in the property securing the mortgage agreement with the proper Public Officer or Office or obtaining accurate and sufficient public information to record the mortgage agreement in the appropriate lien position. The States of North Carolina, Oregon, and Colorado have determined these are illegal title insurance policies or illegal bundling of title insurance. The States of Ohio and Florida also questioned the validity of the policies, and Great American subsequently withdrew the forms from the states.

- Group 9, Inc. has acted as an agent/producer for Great American in the offering and selling of its policies.
- Seattle Specialty Insurance Services, Inc. also has acted as an agent/producer of Great American in the offering and selling of its policies.
- Zurich North American and Zurich American Insurance Company (collectively, Zurich), authorized to issue property and casualty insurance and errors and omissions policies under its property and casualty insurance licenses, offers an insurance policy known as the Processors Liability Policy or the Mortgage Lending Activities Protection Policy (Zurich Policy) as an errors and omissions policy. The Zurich Policy insures against loss arising from senior undisclosed liens or encumbrances by including or bundling the insurance. The policy provides coverage for Loss resulting from a Mortgage Lending Wrongful Act in connection with the Insured's

Mortgage Lending Activities.â??â?• A Mortgage Lending Wrongful Act is defined to mean any actual and material error, neglect, omission, or breach of duty in the actual performance of, or failure to perform, any Mortgage Lending Activities.â?• Such activities include obtaining a tax bill, a credit report, and borrowersâ?? affidavit; and provide insurance for an error with regard to the priority of the mortgage, undisclosed liens, and encumbrances.

- Fidelity & Deposit Company of Maryland, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.
- Colonial American Casualty and Surety Company, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.
- Empire Indemnity Insurance Company, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.
- Travelers Indemnity Company of America (Travelers), licensed as a property and casualty insurer and authorized to issue property and casualty policies, offers insurance policies known as the Home Equity Protector (HEP Policy) as a property and casualty policy and the Mortgage Impairment Policy Program (MIP Policy) as an errors and omissions policy, which include mortgage impairment/lien priority coverage, because they insure against loss arising from senior undisclosed liens and encumbrances. The Mortgage Interest must be impaired because of a previously unknown Mortgage Interest or lien. The Departments of Insurance for the States of North Carolina and Connecticut have determined that the HEP Policy is title insurance and that it cannot be issued by Travelers. The MIP Policy is alleged to include or bundle mortgage impairment/lien priority insurance in a standard Errors and Omissions Policy by endorsements, such as MPI 001â??Failure To Pay Real Estate Tax Extension, MPI 024â??Custodial Errors and Omissions, MPI 029â??Recordation Errors and Omissions, MPI 030â??Title Errors and Omissions, and MPI 032â??Loss of Security Interest Due to Defective Title.
- Guaranty National Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies, has been issuing an insurance policy called the Equiguard Policy as an Errors and Omissions Policy, which includes mortgage impairment/lien priority coverage because it insures against loss arising from senior undisclosed liens and encumbrances. The insurance includes â??loss which you may sustain during the policy period caused by your inability to enforce your rights under a second mortgage loan, due to the existence of a superior lien of which you were unaware; solely as a result of you not performing a standard title search prior to recording your lien or encumbrance on property against which you hold a second mortgage interest.â?•
- Deerfield Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies under its license, has been issuing the Equity Protection Plus Insurance Policy, which includes mortgage impairment/lien priority coverage because it insures against loss arising from senior undisclosed liens and encumbrances. The policy insures against the inability to enforce rights under a second mortgage loan because of a superior lien of which the insured was unaware, solely as a result of not performing a standard title search before recording the mortgage.
- Safeco Insurance Company and Safeco Financial Institution Solutions, Inc. (collectively, Safeco), licensed as a property and casualty insurer and authorized to issue property and casualty policies, has issued the Safeco Policy as a standard property and casualty policy, which includes mortgage impairment/lien priority coverage and insures against an undisclosed senior lien or encumbrance.

- North American Capacity Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies, has issued an insurance policy known as the Loan Backer Program and Lien Sentinel (collectively, the North American Policy) as a standard property and casualty policy, which includes mortgage impairment/lien priority coverage and insures against loss arising from senior undisclosed liens and encumbrances.
- BancInsure, Inc. (BancInsure), licensed as a property and casualty insurer and authorized to issue bonds under its license, has issued an insurance policy known as the Lenders Performance Bond as a standard performance bond, which includes mortgage impairment/lien priority coverage and insures against loss arising from senior undisclosed liens and encumbrances in a bond format by insurance against an encumbrance not known or disclosed to the Obligee. The Departments of Insurance for the States of North Carolina and Louisiana have concluded that BancInsure cannot issue the Bond because it is title insurance and BancInsure is not licensed as a title insurer.
- Matterhorn Financial Services, Inc. is not a licensed insurer and has acted as an agent/producer of BancInsure in the offering and selling of its policies/bonds.

The ALTA complaint was subsequently dismissed for lack of subject-matter jurisdiction, because of a lack of complete diversity between the ALTA, which brought the action in a representative capacity, and all of its members and all of the defendants. The court also declined to exercise jurisdiction under the Declaratory Judgment Act. “The fact that insurance regulation is a matter that is left up to the states militates against the exercise of jurisdiction under the Declaratory Judgment Act, as does the fact that courts in fewer than half the states have ruled to date on the question whether the ‘lien protection’ policy is a policy of title insurance. Each individual state must decide who can be licensed to sell title insurance policies within its borders.” • Am. Land Title Ass’n v. Great Am. Ins. Co., No. C 05-4365 PJH, 2006 U.S. Dist. LEXIS 32771 (N.D. Cal. May 16, 2006). While such insurance may be illegal, it should generally be enforceable by the insured. Travelers Cas. & Sur. Co. v. Didato, No. CV075010742, 2008 Conn. Super. LEXIS 2468 (Conn. Super. Ct. Sept. 17, 2008).

e. Title Waiver Pilot (Waiver on Residential Refinances) and Attorney Opinion Letters (AOL)

Fannie Mae, in its Selling Guide Announcement (SEL-2022-03) dated April 6, 2022, allowed use of attorney title opinion letter in lieu of a title insurance policy for certain transactions subject to certain conditions such as malpractice coverage, gap coverage, absence of a survey exception, and common acceptance in the area where the land is located.

The pilot only covers refinancings and does not affect purchase transactions or home purchasers.

Under this program, closing protection letters would not be available to lenders and also would not be available to borrowers. In contrast, the ALTA Closing Protection Letter—Single Transaction (CPL) will protect the borrower, if the Land is improved solely by a one-to-four family residence, but the CPL by a title insurer will not be available on a transaction if the title insurer is not issuing or contractually obligated to issue a title insurance policy.

Furthermore, title insurance personnel have been instrumental in preventing fraud, impersonation, and other scams through detection and notice of the potential fraudulent act, but this safeguard would be reduced to the extent these personnel were not involved in the transaction.

Fannie Mae in its Selling Guide (at B7-2-06) (12/10/2025) has established guidelines for Attorney Title Opinion letters in lieu of a title insurance policy if the attorney title opinion includes an indemnity from

the attorney, lists other liens and state they are subordinate, includes language similar to the ALTA Endorsement 8,1, provides gap coverage for the period of time between the time of title closing and the recordation of the mortgage, includes language like the ALTA 6, include language like ALTA 5 Series Endorsements, may be subject to minor impediments to Title as provided in B7-2-05, and does not take exception to survey matters, and is not a manufactured home. The attorney opinion letter must provide the following statement:

We I agree to indemnify you and your successors in interest in the mortgage deed of trust opined hereto, to the full extent of all losses attributable to a breach of our my duty to exercise reasonable care and skill in the examination of the title and giving of this opinion.

Freddie Mac in its Single-Family Seller Servicer Guide (at 4702.3) effective 02/04/2026 establishes similar Requirements for an Attorney opinion of title letter as are provided by Fannie Mae, including an indemnity from the attorney, lists other liens and state they are subordinate, includes language similar to the ALTA Endorsement 8,1, provides gap coverage for the period of time between the time of title closing and the recordation of the mortgage, includes language like the ALTA 6, include language like ALTA 5 Series Endorsements, may be subject to acceptable exceptions as provided in 4702.4, is not Tribal Area, is not a manufactured home, and does not take exception to survey matters. The indemnity of the Attorney opinion of title letter must say:

â??We I agree to indemnify you and your successors in interest in the Mortgage deed of trust opined hereto, to the full extent of any loss attributable to a breach of our my duty to exercise reasonable care and skill in the examination of the title and the giving of this opinion.â?•

The Federal Housing Finance Agency (FHFA) has announced and described the title acceptance pilot to allow existing homeowners that meet certain criteria to reduce some closing costs. Title acceptance is a small-scale, limited duration pilot that will use an automated title review process to assess title risk during loan manufacturing and prior to loan purchase. Through this process, Fannie Mae may remove existing requirements that a lenderâ??s title insurance policy or Attorney Opinion Letter (AOL) be obtained for certain transactions. Eligible loans for the pilot will be limited to certain refinance loans with loan-to-value ratios less than 80 percent. Lenders are permitted to sell refinance mortgage loans to the Enterprises if they warrant that the mortgage is a valid first lien on the homeownerâ??s property. The property must be free and clear of any prior lien or encumbrance. Fannie Mae will not require a repurchase or make-whole payment for certain title-related representations and warranties if lenders elect not to obtain title insurance or an AOL. Under the pilot, an automated title review process to assess title risk will instruct whether title insurance or AOL would be required, or whether independent verification of title is unnecessary. If the automated title review process assesses that title risk is low, lenders will not be required to provide additional independent verification and instead will pay a fee to the Enterprise to cover the risk that there is an â??unexpectedâ?• title defect.

Pursuant to Section 29.1.d.1 of the Freddie Mac Multi-Family Sellerâ??s and Servicerâ??s Guide for any Mortgage transaction that is an acquisition which is taken under Seller Application on and after August 15, 2024, the Title Insurance Underwriter, its affiliate under identical ownership, or its wholly-owned subsidiary (unless the stateâ??s laws require a licensed attorney) also must directly perform all escrow and settlement functions for both the Mortgage transaction and the acquisition of the Property and disburse all funds from all sources related to the acquisition and prepare the settlement statement for the acquisition of the Property and the acquisition financing). A Mortgage transaction will be deemed

to be an acquisition if the Property (A) is acquired by the Borrower effective as of the Origination Date, or (B) was acquired by the Borrower or an affiliate of the Borrower within a thirty (30) day period prior to the Origination Date. For any Mortgage transaction that is not an acquisition, the Title Insurance Underwriter may also perform escrow and settlement functions but is not required to do so.

In Administrative Letter 2025-05 (Sept. 9, 2025), the Virginia Bureau of Insurance stated that:

“To the extent that an AOL indemnifies the owner or lender for losses by reason of liens and encumbrances upon property, defects in the title to property, or other matters affecting the title to property or the right to the use and enjoyment of property caused by events outside of the attorney’s control or covers losses unrelated to the opinion expressed in the AOL, then the AOL may be “title insurance” and subject to the Bureau’s regulation. However, the determination of what is and what is not “title insurance” is fact dependent so the Bureau will carefully review the facts of each product and cannot offer an exhaustive list of factors to consider to determine if an AOL is an insurance product. Consumers should be aware AOLs are being offered as substitutes for title insurance but they do not, and legally cannot, offer the same protection as title insurance. The gap in coverage may leave consumers without protection that they believe they purchased. Entities offering AOLs in the Commonwealth should exercise caution to ensure they are not improperly engaging in the business of insurance.



James L. Gosdin is Chief Underwriting Counsel for Amtrust Title Insurance Company. Jim has underwritten title insurance transactions throughout the United States, reinsurance transactions, and international title insurance transactions. Jim received his Bachelor’s Degree from the University of Texas with High Honors and his Juris Doctorate with Honors from the University of Texas School of Law. He is a member of the Order of the Coif and Phi Beta Kappa. Jim is Board Certified by the Texas Board of Legal Specialization in Farm and Ranch, Commercial, and Residential Real Estate. Jim is a

member of and Past Chair of the American Land Title Association (ALTA) Forms Committee; he is a member of the ALTA/NSPS Land Survey Work Group and ALTA Native American Lands Work Group. He also serves on the ALTA State Legislative and Regulatory Action Committee. Jim is a member of the American Bar Association, the Texas Bar Association, and the Houston Bar Association. He is also a member of the Texas Title Standards Joint Editorial Board. Jim was named the 1998â??1999 Title Person of the Year by the Texas Land Title Association. Jim is a Fellow of the American College of Mortgage Attorneys and is a member of the American College of Real Estate Lawyers.

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