

Virginia Land Title Association Advisory Bulletin

Description

Regarding Attorney Opinion Letters in Lieu of Title Insurance

In 2022, as part of new Equitable Housing Finance Plans, the Federal National Mortgage Association (FNMA or “Fannie Mae”) and the Federal Home Loan Mortgage Corporation (FHLMC or “Freddie Mac”) announced that they would accept Attorney Opinion Letters (AOLs) in lieu of a loan policy of title insurance for certain residential mortgage loan transactions.

These policies from two major national Government Sponsored Enterprises create new, and potentially costly risks for both mortgage lenders and homeowners. As a result of these shifting risks, as well as concerns about the potential violation of title insurance laws and regulations across individual states, the American Land Title Association ([ALTA](#)) has taken a strong stance against acceptance of AOLs in place of title insurance. Likewise, the Virginia Land Title Association ([VLTA](#)) is strongly opposed to the acceptance of AOLs in place of title insurance in Virginia real estate transactions.

Staying informed and engaged is the best way to understand and manage risks, and there are a number of useful [resources available from ALTA on this topic](#). It continues to be important to take proactive steps to address this issue. VLTA members are encouraged to express concerns using [ALTA’s Title Action Network](#) to reach out to elected officials and share perspectives.

Title Insurance vs AOLs [\[1\]](#), [\[2\]](#)

Title insurance is the most effective way to protect the property rights of homeowners while also assuring lenders of their interest in a mortgage. While a title search can uncover many risks that might limit an owner’s rights to the property, there are a number of issues that will not be uncovered by a diligent search, making title insurance policies critical to comprehensive protection. The protection afforded to both homeowners and lenders by title insurance plays a critical role in the ability of American households to build wealth through homeownership.

An AOL is an **unregulated alternative** to title insurance in the form of a legal document outlining a given attorney’s opinion on a specific transaction. These letters provide legal advice, but typically do not provide guarantees regarding a property’s title. AOLs depend on the judgement of individual attorneys and may not cover some of the important risks relevant to a particular transaction. Attorneys may only be subject to malpractice claims, that would have to be filed by the homeowner and/or their lender at their own expense, and are not under any obligation to correct any hidden defects and mistakes in the public record not included in their AOL.

Unlike title insurance, AOLs do not provide protection against title defects arising from:

- Undisclosed federal, state, and municipal tax, sewer, and nuisance abatement liens
- Undisclosed mechanic’s liens
- Undisclosed child and spousal support liens

- Undisclosed homeowners' assessment and real property tax liens, lease options, and credit agreements involving personal property secured by the insured mortgage
- Unrecorded interests in the property
- Encumbrances caused by forgeries or mistakes in form of ownership (e.g., transfer of title to a family trust and the effect of bankruptcy filings)
- Fraud, forgery, duress, incapacity, impersonation
- Improper execution of documents (including remote online notary)
- Defective judicial proceedings

Since Fannie Mae and Freddie Mac policies on AOLs are purportedly being enacted to reduce costs and make homeownership more accessible for low-to-moderate-income and minority buyers, it is important to note that title insurance includes coverage for the costs of defense of a claim against title, including attorney fees and litigation costs, while AOLs provide no such cost coverage. Instead, a lender may only be able to recover reasonable attorney fees incurred during a foreclosure if an actual loss is suffered and homeowners may have to shoulder significant cost burdens themselves for the defense of their claim if title issues arise in the future. The homeowner will potentially have to hire a lawyer to pursue a malpractice claim against the attorney who provided the title letter and then pay for another attorney to resolve the title defect. This raises serious concerns as to the true overall cost-saving potential of accepting AOLs in place of title insurance. [Members of the United States Congress have already specifically warned Fannie Mae about these potential cost risks.](#)

A more detailed [coverage comparison](#) of ALTA title insurance policies and AOLs is available from ALTA.

Unregulated Title Insurance Alternatives^[3]

In general, when compared to title insurance, unregulated title insurance alternatives including certain AOLs do not provide the same ongoing risk protections to homeowners or lenders. Policies that enable the acceptance of unregulated alternatives like AOLs in place of title insurance expose consumers to potential risk and unforeseen financial costs.

Title Insurance

Provides coverage for matters not discoverable in a search of public records to ensure comprehensive protection for a homeowner and lender

Provides homeowners and lenders with a defense including all attorneys' fees and costs in title disputes

Covers homeowners and lenders in the event that fraud is discovered

Unregulated Alternatives

Only covers items that could be found in public records search, increasing the likelihood of future title disputes. Items **not discoverable** in a public records search may include federal tax liens, mis-indexed items, HOA liens, and more.

Unclear whether providers will aid lenders or homeowners if a title dispute arises, since providers don't file their products publicly with an insurance commissioner

Unclear if alternatives will cover any potential future costs to clear disputes that arise due to the discovery of fraud

One-time fee, paid at the time of settlement

Highly regulated with stringent oversight by state agencies and insurance commissioners to ensure pricing is fair, adequate, and non-discriminatory

Unclear if homeowners will have to bear additional cost when it comes to defending their property rights since providers don't file their products publicly with an insurance commissioner

Despite similarities to title insurance, providers have not undergone the same regulatory oversight as licensed insurers. There is no clear regulatory authority at the state or federal level allowing these unregulated title insurance alternatives.

Concerns Regarding Compliance with Virginia State Law

- Under Virginia Code Section 38.2-123, "title insurance" is defined as "insurance against loss by reason of liens and encumbrances upon property, defects in the title to property, and other matters affecting the title to property or the right to the use and enjoyment of property and includes insurance of the condition of the title to property and the status of any lien on property."
- Virginia Code Section 38.2-4601.1 defines a title insurance agency or agent as any individual or business entity licensed in the Commonwealth, pursuant to Virginia Code Â§ 38.2-1800 et seq., as a title insurance agent and appointed by a title insurance company licensed in the Commonwealth. The title insurance agency or agent shall perform all of the following services (for which liability arises) relevant to the issuance of title insurance policies, subject to the underwriting directives and guidelines of the agent's title insurance company, including (i) the evaluation of the title search to determine the insurability of the title; (ii) a determination of whether or not underwriting objections have been cleared; (iii) the actual issuance of a title commitment or binder and endorsements; and (iv) the actual issuance of the policy or policies and endorsements on behalf of the title insurance company.
- In order to engage in the business of title insurance, you must be a licensed title insurance agent, comply with the Virginia Bureau of Insurance's rules and regulations, and be appointed by a title insurance company licensed in the Commonwealth of Virginia.
- Some of the new guidelines noted above essentially require AOLs to provide some guarantees and/or indemnifications as to the state of title and provide some indemnity to lenders against losses suffered by reason of liens against the subject property. With these types of representations, AOLs could be considered title insurance and should be regulated as such.
- The practice of issuing AOLs in compliance with the latest guidelines from Fannie Mae and Freddie Mac, in a capacity as a lawyer instead of a title insurance agent, without charging title insurance premiums, and without the product being underwritten and approved by a Virginia-licensed title insurance company, could be considered to be in direct contradiction to Virginia law regarding the insurance of real property title, resulting in liability for the issuing attorney and any guarantor or indemnitor.

Please reach out to your United States senator or representative and urge them to oppose Fannie Mae and Freddie Mac's use of attorney opinion letters.

[1] <https://www.alta.org/file.cfm?name=Summary-Comparison-Loan-Policy-vs-Attorney-Opinion-with-Liability-Wrap>

[2] https://www.forbes.com/sites/forbesbusinesscouncil/2023/05/09/attorney-opinion-letters-versus-title-insurance/?sh=11acf0593f4c&utm_medium=Email&utm_campaign=website&utm_source=Daily+Digest

[3] <https://www.alta.org/media/pdf/advocacy/unregulated-title-insurance-alternatives-risks-to-homeowners-and-lenders.pdf>

Category

1. In the News
2. Legislative
3. Settlements
4. Uncategorized
5. Underwriting

Date Created

2023/09/21

Author

vltaexaminer

VLTA Examiner