

# Minimizing Litigation Risks and Navigating Legal Jeopardy During Commercial Closings

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Presented by  
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**TITLE TENETS** Webinar Series



# Topics covered

- Contract Litigation Risks
- Third Party Litigation Risks
- Special Litigation Issues Relating to Closing Protection Letters
- Litigation Issues in the Current Market Environment

# Contract Litigation Risks

- Drafting Issues
- Seller Disclosure Requirements
- Broker/Agent Disclosure Responsibilities and Risk Mitigation
- Contract Default Rights and Liabilities



# Contract Litigation Risks

## *Drafting Rules of the Road*

- All provisions construed together to determine the intent of the parties
- Handwritten provisions prevail over typewritten
- Interpretation of intent will be construed *against* the party who drafted the contract in the event of conflicting provisions or ambiguities
- The first appearing of two conflicting provisions will prevail over the subsequent provision



# Contract Litigation Risks

## *Fertile Grounds for Litigation*

- Failure to include an accurate or complete legal description of the property
- Not providing adequate times for inspection and due diligence for the seller
- Failure to consider impact of local jurisdictional issues such as transfer taxes and fees, zoning, use and platting logistics
- Failing to adequately consider issues relating to obtaining tenant estoppel certificates
- Inadequate consideration of who is responsible for paying costs if the contract terminates and other termination issues



# Contract Litigation Risks

## *Fertile Grounds for Litigation (cont.)*

- Failure to consider “merger doctrine” in post-closing matters
- Not providing adequate times for inspection and due diligence for the seller
- Over-reliance on “as is, where is” clauses
- Failing to limit default remedies
- Inadequate consideration of who is responsible for paying costs if the contract terminates and other termination issues



# Seller Disclosure Obligations and Associated Litigation Risks

- Most states require disclosure of certain known hazards and risks associated with the subject property
- Eight states currently mandate pre-closing disclosures by sellers in commercial sales, including California, Maine, Michigan, New Hampshire, Minnesota, Texas, Tennessee, and Washington
- Latent defects should ALWAYS be disclosed prior to closing in writing!





# Seller Disclosure Obligations and Associated Litigation Risks

## What is a “Latent Defect”?

A flaw or defect in the property that could not have been discovered by a reasonably thorough inspection before the closing of the sale.





# Broker/Agent Disclosure Responsibilities and Risk Mitigation

## Practice tips:

- Brokers and agents should always advise their seller clients in writing of the importance of full disclosure and accurate completion of required disclosure forms
- Always err on the side of over-disclosing
- Always disclose known or likely suspected latent defects or issues
- Understand and emphasize liability for both affirmative misrepresentations, and non-disclosure of known issues

# Third Party Litigation Risks

- Owner Associations
- Adjacent Property Owners
- Easements and Right-of-way Owners
- Co-Ownership in Property Owner Entities



# Third Party Litigation Risks

## Practice tips:

- Always thoroughly review filed restrictive covenants and POA restrictions
- Obtain complete understanding of costs associated with POA
- Obtain unfiled POA documentation including bylaws, rules and regulations currently in force and proposed to the property owners or board of directors for vote



# Third Party Litigation Risks

## Adjacent Property Owners

- Review and understand rights and duties relating to access, use, and maintenance
- Anticipate new uses by adjacent owners and plan accordingly



# Third Party Litigation Risks

## LLC/JV Co-Ownership Issues

- Bottom Line: Establish and resolve all ownership and management rights and responsibilities BEFORE closing!!



# Closing Protection Letters – What Are They and Why Do You Need Them?

A closing protection letter (CPL) by a title insurer indemnifies the addressee, who may include a lender, seller, borrower, or buyer, against loss because of the failure of the named issuing title insurance agent of the title insurer to comply with certain written closing instructions that relate to the title or lien of the lender, or in the event of fraud or dishonesty of the title insurance agent in handling the funds and documents.





American Land Title Association

 Closing Protection Letter –  
 Single Transaction  
 Revised 12-1-11 04-02-14

 CLOSING PROTECTION LETTER  
 SINGLE TRANSACTION  
 BLANK TITLE INSURANCE COMPANY

Addressee:

Date:

Name of Issuing Agent or Approved Attorney (the "Issuing Agent" or "Approved Attorney," as the case may require):

*(Name of Issuing Agent or Approved Attorney appears here.)*

Transaction (the "Real Estate Transaction"):

Re: Closing Protection Letter

Dear

In consideration of Your acceptance of this letter, Blank Title Insurance Company (the "Company"), agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the date of this letter, subject to the Conditions and Exclusions set forth below and provided:

- (A) the Company issues or is contractually obligated to issue a Policy for Your protection in connection with the closing of the Real Estate Transaction;
- (B) You are to be the (i) lender secured by the Insured Mortgage or (ii) purchaser or lessee of the Title;
- (C) the aggregate of all Funds You transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed \$ \_\_\_\_\_; and
- (D) Your loss is solely caused by:
  - 1. failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
    - (a) the disbursement of Funds necessary to establish the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage; or
    - (b) the obtaining of any document, specifically required by You, but only to the extent that the failure to obtain the document affects the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage;
  - or
  - 2. fraud, theft, dishonesty, or misappropriation of 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 relates to the status of the Title or to the validity, enforceability, or priority of the lien of the Insured Mortgage.

**Conditions and Exclusions**

- 1. Your transmittal of Funds or documents to the Issuing Agent or Approved Attorney constitutes Your acceptance of this letter.
- 2. For purposes of this letter:
  - a. "Commitment" means the Company's written contractual agreement to issue the Policy.
  - b. "Funds" means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.
  - c. "Policy" or "Policies" means the contract or contracts of title insurance, each in a form adopted by the American Land Title Association, issued or to be issued by the Company in connection with the closing of the Real Estate Transaction.
  - d. "You" or "Your" means the Addressee of this letter, the borrower if the Land is solely improved by a one-to-four family residence, and subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,
    - (i) the assignee of the Insured Mortgage; and



- (i) the warehouse lender in connection with the Insured Mortgage.
- e. "Indebtedness," "Insured Mortgage," "Land," and "Title" have the same meaning given them in the American Land Title Association Loan Policy (08-17-06).
3. The Company shall have no liability under this closing protection letter for loss arising out of:
- a. failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection inconsistent with that set forth in the Commitment. Your written closing instructions received and accepted by the Issuing Agent or Approved Attorney after issuing the Commitment that require the removal, where allowed by state law, rule, or regulation, of specific Schedule B Exceptions from Coverage or compliance with the requirements contained in the Commitment shall not be deemed to require inconsistent title insurance protection;
  - b. loss or impairment of Your Funds in the course of collection or while on deposit with a bank due to bank failure, insolvency, or suspension, except loss or impairment resulting from failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions to deposit the Funds in a bank that You designated by name;
  - c. any constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation. This subsection does not affect the coverage, if any, as to any lien for services, labor, materials, or equipment afforded in the Policy;
  - d. fraud, theft, misappropriation, dishonesty, or negligence of Your employee, agent, attorney, or broker;
  - e. Your settlement or release of any claim without the Company's written consent;
  - f. any matters created, suffered, assumed, or agreed to or actually known by You;
  - g. Federal consumer financial law, as defined in 12 U.S.C. § 5481 (14), or other federal or state laws relating to truth-in-lending, a borrower's ability to repay a loan, qualified mortgages, consumer protection, or predatory lending;
  - h. federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention;
  - i. the periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land relating to the Real Estate Transaction; or
  - j. the Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code.
4. If the closing is to be conducted by an Approved Attorney, a Commitment must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.
5. When the Company shall have indemnified You pursuant to this letter, it shall be subrogated to all rights and remedies You have against any person or property had You not been indemnified. The Company's liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation.
6. The Company's liability for loss under this letter shall not exceed the least of:
- a. the amount of Your Funds;
  - b. the Company's liability under the Policy at the time written notice of a claim is made under this letter;
  - c. the value of the lien of the Insured Mortgage; or
  - d. the value of the Title Insured or to be Insured under the Policy at the time written notice of a claim is made under this letter.
7. If You are not a purchaser, borrower, or lessee, You must hold the Indebtedness both at the time that the Company is notified of a claim pursuant to this letter and at the time that payment is made to make a claim for indemnification under this letter.
8. Payment to You or to the owner of the Indebtedness under the Policy or Policies or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.
9. The Issuing Agent is the Company's agent only for the limited purpose of issuing Policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.
10. In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be

provided with written notice under this provision shall not be excused by lack of prejudice to the Company. You must promptly send written notice of a claim under this letter to the Company at its principal office at \_\_\_\_\_ If the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice.

11. \_\_\_\_\_

12. The Company shall have no liability under this letter if:

a. the Real Estate Transaction has not closed within one year from the date of this letter; or

b. at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above.

13. The protection of this letter extends only to real estate in [State], and any court or arbitrator shall apply the law of the jurisdiction where the Land is located to interpret and enforce the terms of this letter. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. Any litigation or other proceeding under this letter must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

[14. Either the Company or You may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than \$2,000,000. There shall be no right for any claim under this letter to be arbitrated or litigated on a class action basis. If You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than \$2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and You. If the Real Estate Transaction solely involves a one-to-four family residence and You are the purchaser or borrower, the Company will pay the costs of arbitration.]

This closing protection letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction.

**BLANK TITLE INSURANCE COMPANY**


By: \_\_\_\_\_  
Authorized Signatory

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent.)

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PURCHASER/SELLER INSURED CLOSING SERVICE LETTER (T-51)

(FORM T-51: PURCHASER/SELLER INSURED CLOSING SERVICE LETTER)

DATE

Re: Purchaser/Seller Promulgated Insured Closing Service Letter  
Name of Licensed Direct Operation or Texas Title Insurance Agent:

(hereinafter "Texas Agent")

Gentlemen:

In response to your request, \_\_\_\_\_ a \_\_\_\_\_ corporation, with its principal office in Texas at \_\_\_\_\_ (the "Company"), offers to you, provided that an owner policy of title insurance issued by the Company has been specified and requested for the purchaser in connection with the particular closing, the following described protection with respect to the closing of your real estate transactions by the Company's above named Texas Agent during the effective term hereof.

The term Texas Agent shall include a direct Operation of the Company if the name of the direct Operation is set forth in the "RE" paragraph above.

The Company will replace your settlement funds that are lost after receipt of such funds by such Texas Agent as a direct, proximate result of the fraud or dishonesty of such Texas agent, provided that a Commitment for Title Insurance from this Company or its Texas Agent is issued to the purchaser before closing by such Texas Agent.

Notwithstanding your instructions to such Texas Agent in regard to the disbursement of funds nothing herein contained shall be construed as imposing liability on the Company for unfilled Mechanic's and Materialmen's Liens.

The Company shall not be liable for loss or impairment of your settlement funds in the course of collection or on deposit with a bank for disbursement due to bank failure, insolvency or suspension, except such as shall be as the direct result of the failure of such Texas Agent to comply with your written instructions to deposit the funds in a particular named bank.

The Company will not be liable hereunder for any loss or expense you sustain

- (1) arising in whole or in part as a result of the fraud, dishonesty or negligence of you or your employee, agent or attorney,
- (2) as a result of your settlement or release of any claim without the written consent of the Company, or
- (3) arising as a result of any matters created, assumed, assumed or agreed to by you or known to you.

The Company shall not be liable on account of any laws excluded from owner policy coverage pursuant to the promulgated Condition and Stipulations and Exclusions from Coverage of the Owner Policy of Title Insurance, or on account of the Real Estate Settlement Procedures Act of 1974, as amended, nor shall this letter be construed as authorizing the Texas Agent, or any other representative of the Company, to exercise any discretion in your behalf, to undertake any responsibility in your behalf, or to undertake your performance in whole or in part with respect to any of laws referred to above.

The Company shall not be liable hereunder unless notice of claim in writing is received by the Company at its principal office in Texas within twelve (12) months after the date of Closing the Transaction.

Whenever the Company shall have settled a claim hereunder, the Company shall be subrogated to all your rights and remedies against any person or property with respect to such claim, all right of subrogation shall vest in the Company unaffected by any act by you or by the Company, and you shall permit the Company to use your name in any transaction or litigation involving such rights or remedies.

The protection offered will be effective as to matters arising after receipt of a copy of this letter at the said Texas principal office of the Company bearing the signature of you or your duly authorized officer in the space provided below; will supersede all prior agreements; will extinguish all duties of the Company with respect to the loss of your settlement funds except as expressly set forth herein; and will be binding upon you and the Company until at the sole discretion of the Company notice of termination is mailed to you at your address as indicated above. A rebuttable presumption of receipt by the Company, of a copy of this letter bearing the signature of you or your duly authorized officer, may be established by: (i) the signed green return receipt card evidencing proof of receipt of this letter by certified or registered mail; or, (ii) a receipt evidencing delivery of this letter by an independent express mail delivery service.

Pursuant to Article 9.49 of the Texas Insurance Code, only real property transactions in excess of \$250,000.00 are eligible for insured closing service protection for the purchaser/seller. Therefore, this letter shall be null and void if the sales price of the real property (on any single real estate transaction intended by the recipient to be covered by this insured closing service letter) is \$250,000.00 or less. The Company shall not be liable for the first \$250,000.00 of loss to any claimant which constitutes a covered claim pursuant to Article 9.49 of the Code.

This form, promulgated by the Texas Department of Insurance in accordance with the Texas Title Insurance Act, as amended, is the only purchaser/seller form permissible for insured Closing in the State of Texas.

Yours very truly,

\_\_\_\_\_  
(Printed Name of Company)  
By \_\_\_\_\_  
(Signature)  
Title: \_\_\_\_\_  
Printed Name: \_\_\_\_\_

**ACCEPTANCE BY PURCHASER/SELLER ADDRESSEE**

ACCEPTED AND AGREED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Printed Name of Addressee)  
By \_\_\_\_\_  
(Signature)  
Title: \_\_\_\_\_  
Printed Name: \_\_\_\_\_

# Litigation Issues in the Current Market Environment

- Desperate people do desperate things in desperate times
- Nervous investors
- “Extra” due diligence in the closing process!





# Thank You

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## **Stewart Title Guaranty Company**

1717 Main Street, Suite 3500  
Dallas, Texas 75201  
[stewart.com/commercial](http://stewart.com/commercial)



## **Stewart Title Guaranty Company National Commercial Services**

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