

STATE OF MICHIGAN  
IN THE SUPREME COURT

On Appeal from the Court of Appeals - (Murphy, CJ; Markey & Riordan, JJ)

BANK OF AMERICA, N.A.,

Supreme Court No. 149599

Plaintiff-Appellant,

Court of Appeals No. 307756

v

Oakland Circuit No. 10-112606-CK  
Hon. Denise K. Langford-Morris

FIRST AMERICAN TITLE INSURANCE  
COMPANY; PATRIOT TITLE AGENCY,  
LLC; KIRK D. SCHIEB; WESTMINSTER  
ABSTRACT COMPANY d/b/a  
WESTMINSTER TITLE AGENCY, INC.;  
THE PRIME FINANCIAL GROUP, INC.;  
VALENTINO M. TRABUCCHI; PAMELA  
S. NOTTURNO, f/k/a PAMELA S. SIIRA;  
DOUGLAS K. SMITH; JOSHUA J.  
GRIGGS; NATHAN B. HOGAN; STATE  
VALUE APPRAISALS LLC and  
CHRISTINE D. MAYSANURADHA  
SREENIVASAN and BALAJI  
GANAPATHY,

Defendants-Appellees,

and

FRED MATSON, MICHAEL LYNETT, JO  
KAY JAMES, and PAUL SMITH,

Third-Party Defendants.

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**BRIEF AMICUS CURIAE OF AMERICAN LAND TITLE ASSOCIATION**

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Dated: April 29, 2015

**STATEMENT OF QUESTIONS ADDRESSED**

This brief addresses two issues raised in the Court's November 19, 2014 Order:

- I. Is the full credit bid rule of *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008) a correct rule of law, and does it apply to the facts of this case?

<b>The Court of Appeals answered:</b>	<b>Yes</b>
<b>Plaintiff-appellant answers:</b>	<b>No</b>
<b>Defendants-appellees answers:</b>	<b>Yes</b>
<b><i>Amicus curiae</i> ALTA answers:</b>	<b>Yes</b>

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## **INTRODUCTION AND STATEMENT OF INTEREST**

*Amicus curiae* American Land Title Association (ALTA) is a national trade association that serves as the voice of the abstract and title-insurance industry. Founded in 1907, its 5,400 active members include title agents, abstracters, and title-insurance companies in most counties across the nation, including many in Michigan. Its members range from small, one-county operations to large national title insurers, including defendant-appellee First American Title Insurance Company. Additionally, associate ALTA membership is held by attorneys, builders, developers, lenders, real-estate brokers, surveyors, consultants, educational institutions, computer-services firms, and related national trade associations.

ALTA advocates safe and efficient transfer of real estate, and has developed the familiar ALTA title-insurance forms used voluntarily by title insurers across the Nation. It also works to develop a better understanding of the land-title industry among those who interface with it, and to that end, routinely works with State and Federal legislators and regulators on items of interest to its members. *See, e.g.*, Brief of Plaintiff-Appellant Bank of America, p 25 (citing June 2009 written testimony of Frank Pellegrini to U.S. House Financial Services Subcommittee Hearing). Additionally, ALTA on occasion will file *amicus curiae* briefs with State and Federal appellate courts in cases of major importance to the land-title industry, such as this.

This brief will address the third issue raised in this Court's November 19, 2014 Order granting leave: whether the full credit bid rule of *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008), is a correct rule of law

and if so, whether it applies to this case. ALTA answers both questions in the affirmative.

## DISCUSSION

**I. *New Freedom Mortgage* correctly states the full credit bid rule, and the Court of Appeals properly applied it to bar recovery under the CPLs for the Kirkway and Enid closings.**

**A. Background**

Title insurance insures against the risk of a total or partial loss due to a defect in title to real property. 1 Palomar, *Title Insurance Law* (2012), § 1:8, p 22. But it differs from other types of insurance in certain respects. For instance, while life or property insurance deals with the risk of loss due to a future event, i.e. death, fire, wind damage, or the like, title insurance addresses the risk of loss from an event that has already occurred – the past event that caused the title defect. 18 Tryniecki, *Missouri Practice Series: Real Estate Law* (3d ed, 2012) § 5:2, p 82.

"There are two primary types of title insurance policies that are issued to two different actors in the real estate transfer process....the owner's policy, which insures the buyer against property loss due to a title defect....[and] the lender's, or loan policy, which insures the lender against a loss of the security for its security instrument due to a title defect." Frantze, *Equity Income Partners LP v. Chicago Title Insurance Co. and Recovery Under a Lender's Title Insurance Policy in a Falling Real Estate Market*, 48 *Real Prop Tr & Est LJ* 391 (Fall 2013), *citing* Burke, *The Law of Title Insurance*, (3d ed supp 2012), § 2.01. Under a lender's policy, there generally are three limitations on the title insurer's liability: "[T]he amount of insurance purchased by the lender, the amount remaining on the debt as secured by the insured lien, and the actual loss caused by the

title defect as measured by the decrease in fair market value of the property. *Id*, citing American Land Title Association, *Loan Policy of Title Insurance* (June 17, 2006), <<http://www.alta.org/forms/Intro.cfm>> [click on "Most Requested," then "ALTA<sup>®</sup> Loan Policy (6-17-06)](accessed April 24, 2015).

In connection with a lender's policy, a title-insurance company typically will issue a closing protection letter (CPL). The CPL is an agreement by the title insurer to indemnify the lender for "actual loss" the lender may incur in connection with the closing of a real-estate transaction conducted by the issuing agent or approved attorney. As the Court of Appeals correctly noted, a CPL "is an indemnity agreement, not an insurance policy," and its purpose is to make the national title-insurance underwriter's financial resources available "to indemnify lenders and purchases for the local agent's errors or dishonesty with escrow or closing funds." *Op* at 8, quoting *JP Morgan Chase Bank, NA v First Am Title Ins Co*, 795 F Supp 2d 624, 628 (ED Mich, 2011) and *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 80; 761 NW2d 832 (2008). CPLs are ubiquitous in the 49 states (Iowa excepted) where title insurance is used, and "[g]enerally, national lenders will not entrust money or loan documents to settlement attorneys or title insurance agents unless the title insurer has issued [one]. Davis, *The Law of Closing Protection Letters*, 36 Tort & Ins L J 845 (Spring 2001).

CPLs thus provide a valuable economic benefit, by facilitating the closing of real-estate transactions that otherwise might occur only with increased expense, if at all. ALTA first adopted a standard form CPL in 1987 and revised and reissued it in 2006, with three subsequent updates, most recently in 2014. See ALTA 2006 CPL – Single Transaction, <<http://www.alta.org/forms/Intro.cfm>> [click on "Related Documents," then

"ALTA<sup>®</sup> Closing Protection Letter - Single Transaction (4-2-14)"] (accessed April 24, 2015), p 1, attached at **Tab 1**.

In a non-judicial foreclosure, credit bidding is the practice of allowing a foreclosing lender to bid on the property at auction not with cash, as other bidders are required to do, but with a credit bid up to the amount of its mortgage debt, including allowable expenses. Baxter, *The Law of Distressed Real Estate*, § 12.13[6], pp 12-29. In other words, the lender is allowed to use the debt it is owed to offset the purchase price. *RadLAX Gateway Hotel LLC v Amalgamated Bank*, 132 S Ct 2065, 2069; 182 L Ed 2d 967 (2012). Allowing the lender to credit bid avoids "the inefficiency of requiring [it] to tender cash which would only be immediately returned to it." *Alliance Mortgage Co v Rothwell*, 10 Cal 4th 1226, 1238; 44 Cal Rptr 2d 352; 900 P2d 601 (1995).

A full credit bid is a bid in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other foreclosure expenses. Under the full credit bid rule, when a lender makes such a bid at a nonjudicial foreclosure and prevails, it is precluded for purposes of collecting its debt from later claiming that the property was worth less than its bid. *Rothwell*, 10 Cal 4th at 1238 (citations omitted). The lender is not entitled to insurance proceeds payable for pre-purchase damage, pre-purchase net rent proceeds, or damages for waste, because its only interest in the property – repayment of its debt – has been satisfied, and anything beyond that would be a double recovery. *Id* at 1238-39, citing *Cornelison v Kornbluth*, 15 Cal 3d 590, 606-607; 125 Cal Rptr 557; 542 P2d 981 (1975); see also *Heritage Fed Savings Bank v Cincinnati Ins Co*, 180 Mich App 720, 724; 448 NW2d 39 (1989).

A majority of States follows the full credit bid rule,<sup>2</sup> and the parties to this case do not dispute its general applicability to satisfy a mortgage debt, extinguish the mortgage, and bar a mortgagee's further recovery against the mortgagor. *See, e.g.*, Bank of America's 1/28/15 brief, p 42. Rather, the issue is whether the Court of Appeals correctly applied the full credit bid rule to bar recovery against non-borrower third parties. A variety of reasons support the bar on recovering against a title insurer under a CPL by one who makes a full credit bid, and the Court of Appeals in both *New Freedom* and this case was correct in applying the rule.

**B. *New Freedom* properly applied the full credit bid rule, since a contrary result would allow a mortgagee to receive a double recovery and undermine the integrity of the foreclosure process.**

The full credit bid rule serves two basic purposes. One, it precludes the lender from obtaining a double recovery. "This is because the lender's only interest in the property is repayment of the debt. The lender's interest having been satisfied, any other payment would result in a double recovery." *Najah v Scottsdale Ins Co*, 230 Cal App 4th 125, 134; 178 Cal Rptr 3d 400 (2014) (citations omitted). And second, it "serves to protect the integrity of the foreclosure auction." *Id.* Foreclosure sales are to be

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<sup>2</sup> *See, e.g.*, *Nussbaumer v Superior Ct*, 107 Ariz 504, 505-507; 489 P2d 843 (1971); *Rothwell*, 10 Cal 4th 1226; *Partel, Inc v Harris Tr & Sav Bank*, 106 Ill App 3d 962, 965; 63 Ill Dec 303; 437 NE2d 1225 (1982); *Whitstone Sav & Loan Assocs v Allstate Ins Co*, 28 NY2d 332; 321 NYS2d 862; 270 NE2d 694 (1971); *In re Miller*, 513 Fed App'x 566 (CA 6, 2013) (bank's full credit bid at sheriff's sale extinguished entire debt under either Wisconsin or Michigan law). Indeed, Colorado and Wyoming appear to be the sole exceptions, apart from Iowa. *Security Svc Fed CU v First Am Mortgage Funding, LLC*, 861 F Supp 2d 1256, 1264 (D Colo, 2012); *Republic Bank of Chicago v First Advantage Bank*, 2013 Ill App 120885; 376 Ill Dec 366, 373; 999 NE2d 9 (2013) ("[A]s recognized by both parties, the full credit bid rule is not recognized in the state of Wyoming").

conducted fairly and openly, with an eye toward maximizing the price obtained for the property. As the California appellate court recently noted in *Najah*:

A lender who intends to later claim that the value of the property was impaired due to waste, fraud or insured damage, but nonetheless makes a full credit bid, interferes with that process by impeding bids from third parties willing to pay some amount between the value the lender places on the property and the amount of its full credit bid....The full credit bid rule may act to limit recovery by a foreclosing lender who hopes to pursue a legal claim for injury to the property. But if there were no repercussions for making a full credit bid, lenders could manipulate the sale and discourage prospective purchasers who might have been willing to pay just under the value of the lien. [230 Cal App 4th at 135, *citing* 4 Miller & Starr, *Cal Real Estate* (3d ed 2013) § 10:265, p 10-1067 and *Michelson v Camp*, 72 Cal App 4th 955, 964; 85 Cal Rptr 2d 539 (1999)].

The rule thus is an efficiency-maximizer. And far from incentivizing mortgagees to seek recovery from "unsophisticated borrowers," Bank of America's brief, p 46, its bar on lender claims against nonborrower third parties instead compels lenders to more realistically assess the wisdom of making full credit bids in the first instance. *See, e.g.*, John L. Hosack, *The Full Credit Bid at a Foreclosure Sale: Don't Make One Without the Advice of Knowledgeable Counsel*, <<http://www.buchalter.com/publication/the-full-credit-bid-at-a-foreclosure-sale-dont-make-one-without-the-advice-of-knowledgeable-counsel-2/>> (posted July 2014) (accessed April 27, 2015), *citing* Hansen, *The Full Credit Bid "Rule" and Occam's Razor*, 30 Cal Real Prop J 32 (No. 4, 2012); *see also* Sean M. Sherlock, *New California Case Illustrates Peril of Full Credit Bid*, <<http://www.swlaw.com/blog/real-estate-litigation/2014/10/06/new-california-case-illustrates-peril-of-full-credit-bid/>> (posted Oct. 6, 2014) (accessed April 27, 2015).

In *New Freedom*, the Court of Appeals applied the full credit bid rule to bar fraud and other claims brought against a residential mortgage originator-broker (Globe), a title-insurance company (Commonwealth), and an appraiser (Chastain) by plaintiff-lender

after two home loans went bad. Reviewing but ultimately rejecting foreign authority declining to extend the rule to nonborrower third parties, the Court of Appeals grounded its ruling in both of the rule's rationales – which it traced to this Court's decision in *Smith v Gen Mortgage Corp*, 402 Mich 125; 261 NW2d 710 (1978), on which the trial court had relied:

To allow the mortgagee, after effectively cutting off or discouraging lower bidders, to take the property – and then establish that it was worth less than the bid – encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders. [*New Freedom*, 281 Mich App at 74, quoting *Smith*, 402 Mich at 129 and *Whitestone*, 28 NY2d at 337].

See also *Id* at 74-75 ("[t]he *Smith* rule was intended to prevent a mortgagee from receiving a double recovery"), citing *Heritage Fed Savings Bank*, 180 Mich App at 725-726.<sup>3</sup>

The same policies that justified application of the full credit bid rule to bar claims against nonborrower third parties in *New Freedom* justify it with regard to the Kirkway and Enid closings in this case. As Bank of America acknowledges, it purchased the Kirkway property in foreclosure with a full credit bid of \$1.58 million, and the Enid property with a full credit bid of \$3.94 million. Brief, pp 11, 15. Its only interest in either property – repayment of its debt – was at that point satisfied, and it had no damages, a requisite element of its claims. Anything additional would be a double

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<sup>3</sup> The Court of Appeals in this case properly (and unanimously) read *New Freedom* as applying the full credit bid rule to the CPLs at issue in that case, though the *New Freedom* panel did not explicitly cite the rule in that portion of its opinion. Op at 12-13; also Murphy, CJ, concurring in part and dissenting in part), Op at 2. Separately addressing a fraud claim against the appraiser, *New Freedom* also held that the lack of damages as a result of the full credit bid required summary disposition against plaintiff. 281 Mich App at 84-86.

recovery. Further, to allow Bank of America to then turn around and argue that it suffered a loss upon resale of \$1.1 million (Kirksway) and \$3.3 million (Enid), Brief at 12, 15, rewards it for bidding strategically and discouraging prospective lenders who might have bid just under the lien value. *Najah*, 230 Cal App 4th at 135. In applying the rule here, the Court of Appeals' simply took Bank of America at its word in the foreclosure proceedings. "Under the full credit bid rule, a lender who enters a full credit bid at a non-judicial foreclosure sale is deemed to have irrevocably warranted that the value of the security foreclosed upon was equal to the outstanding indebtedness and not impaired." 55 Am Jur 2d, Mortgages, § 524, citing *Kolodge v Boyd*, 88 Cal App 4th 349; 105 Cal Rptr 2d 749 (2001); accord *Titan Loan Investment Fund, LP v Marion Hotel Partners, LLC*, 891 NE2d 74 (Ind Ct App 2008) ("The full credit bid rule precludes a lender, for purposes of collecting its debt, from making a full credit bid and subsequently claiming that the property was actually worth less than the bid").

Application of the full credit bid rule against nonborrower third parties does not encourage mortgage fraud, as Bank of America argues. To the contrary, it discourages manipulation of foreclosure sales and prevents wrongdoing of a different sort. "To allow the lender, after effectively cutting off or discouraging lower bidders, to take the property – and then establish that it was worth less than the bid – encourages fraud, creates uncertainty as to the borrower's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders." *M&I Bank, FSB v Coughlin*, 805 F Supp 2d 858, 866 (D Ariz 2011) (internal brackets omitted), quoting *Whitestone*, 28 NY2d at 337. In short, the rule simply bars a lender from having its cake and eating it, too.

Application of the rule also honors the terms of the limited agreement between the lender and the title insurer that the CPL embodies. The CPL expressly states that when a title insurer has reimbursed the lender pursuant to the CPL, the title insurer "shall be subrogated to all rights and remedies which [the lender] would have had against any person or property had [the lender] not been so reimbursed." **Tab 1**, p 3 (Condition and Exclusion No. 5). The CPL further provides that the title insurer's liability for such reimbursement "shall be reduced to the extent that [the lender has] knowingly and voluntarily impaired the value of such right of subrogation." *Id.* Where a lender makes a full credit bid, it not only extinguishes its ability to further pursue the borrower, it also impairs the title insurer's subrogation rights. Application of the full credit bid rule to the CPL simply acknowledges and effectuates that provision.<sup>4</sup>

Far from rendering Michigan an outlier, *New Freedom* joined the state's jurisprudence to that of other States that have applied the full-credit bid rule to extend protections to title insurers and other non-borrower third parties. *See Equity Income Partners LP v Chicago Title Ins Co*, 2013 US Dist LEXIS 173432; 2013 WL 6498144 (D Ariz Dec. 11, 2013) (applying Arizona law); *Pacific Inland Bank v Ainsworth*, 41 Cal App 4th 277, 282-284; 48 Cal Rptr 2d 489 (1995) (full credit bid rule bars non-fraud tort claims against appraiser); *Freedom Mortgage Corp v Burnham Mortgage, Inc.*, 720 F Supp 2d 978, 1005-08 (ND Ill 2010) (full credit bid precluded recovery of damages from mortgage broker, appraisers, or title company); *but see Bank of Idaho v First American*

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<sup>4</sup> It also is consistent with Condition and Exclusion No. 8, which provides that "[p]ayment to [the lender] 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." **Tab 1**, p 3 (emphasis added).

*Title Ins Co*, 156 Idaho 618; 329 P3d 1066 (2014) (term "all payments made" in title-insurance policy did not include full credit bid by insured at trustee's sale so as to terminate insurer's liability).

Policy reasons also counsel against overruling *New Freedom* and extending liability against First American in the manner Bank of America seeks. As noted, CPLs are widely used. While ALTA periodically revises its standard CPLs to reflect market changes, such changes reflect a knowing assumption of increased or decreased risk by both the title insurer and the lender. Further, CPLs do not represent a guarantee of full repayment of a mortgage loan; the essence of a mortgage transaction is that the lender either is repaid by the borrower or a loan guarantor, or it receives the collateral. Bank of America proposes a regime where it not only recovers the collateral, but seeks additional payment from a title insurer. But a title insurer in issuing a CPL does not agree to take on the obligation of becoming a "shadow loan guarantor," a role properly that of a *mortgage* insurer – nor does it factor such expansive coverage into its pricing decision. Bank of America's rule would not only expand title insurers' liability judicially, but do so in unknown and potentially vast amounts – even where the lender's full credit bid has resulted in there being no "loss." Michigan title insurers doubtless have factored *New Freedom* into their pricing decisions for lender's policies and CPLs. Rewriting that rule judicially would inject uncertainty into the market for these products, and upset settled expectations of the parties to such contracts.

Mortgage fraud indeed is a serious problem, and one that ALTA has taken extensive steps to help combat. Testimony of Frank Pelligrini on behalf of ALTA to the House Financial Services Subcommittee on Oversight and Investigations, June 18, 2009

<[http://www.alta.org/advocacy/testimony/09-06-18\\_FSC\\_Hearing-MortgageFraud\\_Written\\_Pelligrini.pdf](http://www.alta.org/advocacy/testimony/09-06-18_FSC_Hearing-MortgageFraud_Written_Pelligrini.pdf) (accessed April 24, 2015), pp 14-15. From its frontier days through the present, America's economy has relied on a foundation of private-property rights that forms the basis for our entrepreneurial system, including its dynamic creation of wealth and capital, and widespread home ownership. "The willingness of individuals and businesses to invest in real estate anywhere in the United States, or to loan money to those who own or are acquiring real estate and the ready marketability of those interests and loans is fostered and preserved by the title insurance industry." *Id* at 5-6. But the answer to mortgage fraud is not to allow lenders to obtain one full recovery in foreclosure, to the exclusion of others making economically more rational bids, and then turn around and seek still more from a title insurer, appraiser, or other third party.

**CONCLUSION/RELIEF REQUESTED**

The Court of Appeals ruling should be affirmed.

Respectfully submitted,

THE SMITH APPELLATE LAW FIRM

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**American Land Title Association**

Dated: April 29, 2015

**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



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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
    - (ii) 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 (06-17-06).
  
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;

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- 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.
  11. 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
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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.

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.)

