STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Howard Mills
Superintendent

The Office of General Counsel issued the following opinion on December 28, 2005, representing the position of the New York State Insurance Department.

Re: Issuance of Closing Protection Letter by Title Insurance Company

Question Presented:

May a title insurance company issue, in New York, a letter that makes such title insurance company liable for acts of its title agent that are within the scope of that title agent's authority while acting on the title insurer's behalf?

Conclusion:

A title insurance company may issue, in New York, a letter that makes such title insurance company liable for acts of its title agent that are within the scope of that title agent's authority while acting on the title insurer's behalf.

Facts:

The Department issued Circular Letter No. 18 ("CL #18") on December 14, 1992, which addressed the issuance of closing protection letters ("CPL") by title insurance companies to lenders. Apparently, such CPLs protected lenders against losses caused by improper acts or omissions by a lender's attorney in connection with underlying real property transactions. CL #18 equated such coverage to fidelity, surety or professional liability insurance and found, among other things, that "title insurers lack authority to issue a CPL [closing protection letter] to a lender insofar as that lender's attorney is concerned, because its purported protection falls beyond the scope of the monoline title insurer's license and writing authority that is exclusively confined to Section 1113(a)(18) of the Insurance Law."

However, CL #18 stated that a title insurer would not be precluded from issuing an appropriate agent authorization letter that is confined to the title insurer's liability as principal for the acts of its agent within the scope of that agent's authority on the title insurer's behalf.

The inquirer acknowledges the positions taken in CL #18 and submitted, for the Department's review and approval, a sample closing protection letter. Subsequently, the inquirer has withdrawn his request for review and approval of such sample letter and, instead, asked that we issue a general response to his inquiry.

Analysis:

As CL #18 stated, title insurance companies lack authority to issue a closing protection letter ("CPL") to a lender regarding the acts of the lender's attorney because the protection offered is beyond the scope of the monoline title insurance company's license and writing authority that is exclusively confined to Section 1113(a)(18) of the Insurance Law. However, a title insurance company is not precluded from issuing an appropriate agent authorization letter that is confined to the title insurance company's liability as principal for the acts of its agent within the scope of that agent's authority on the title insurance company's behalf, as stated in CL #18.

The protection afforded by closing protection letters should be limited to the title insurance policy itself. One concern that was highlighted in CL #18 involved situations where the title agent that is being protected by a closing protection letter is also the lender's attorney. CL #18 stated that "[e]ven in the unusual situation where the title insurer's approved attorney and the lender's designated attorney happen to be one and the same, it is unclear what a CPL purports to do beyond the title insurance policy itself. Insofar as it diverges from the title insurance policy, a CPL would constitute an unauthorized act." Any coverage that is provided under such letter must, as stated in CL #18, be limited to activities that are within the scope of the title agent's duties. A closing protection letter that offers coverage that goes beyond a title agent's duties would be prohibited.

For further information please contact Associate Attorney D. Monica Marsh at the New York City Office.