



State of Utah

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Insurance Department

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BULLETIN 2023-2

To: Title Insurance Producers
From: Jonathan T. Pike, Insurance Commissioner
Date: March 1, 2023
Subject: **Settling Loans That Utilize an Attorney Opinion Letter**

Several title insurance producers have received an offer from a mortgage lender to act as a settling agent for loans that utilize an Attorney Opinion Letter (AOL). This proposal includes two unique features:

- The settling agent will not issue a lender's title insurance policy as part of the transaction. Instead, the lender will separately obtain an AOL that will serve as a substitute for the policy.
- After closing the transaction, the settling agent will provide a Closing Indemnification Letter (CIL) stating that the settling agent promises to "indemnify Lender for actual loss of monies incurred by Lender in connection with the settlement and disbursement" in the loan closing.

Those features have raised two questions for title insurance producers. First, is a title insurance producer prohibited by law from settling a transaction involving an AOL? Second, is the promise to indemnify in the CIL an insurance product? The Department answers "no" to both questions.

1. A title insurance producer is not prohibited from settling a transaction involving an AOL.

The Department is unaware of a legal prohibition on settling a real estate transaction simply because it involves an AOL. However, in order to settle the transaction, a title insurance producer must issue an owner's or lender's title insurance policy as part of the transaction. *Utah Code § 31A-23a-406(1)(c)*. Although the option to issue a lender's policy has been eliminated under the mortgage lender's proposal, nothing appears to prevent the producer from issuing an owner's policy as part of an AOL transaction. Therefore, a producer is not prohibited from settling an AOL transaction as long as the producer issues an owner's policy as part of the transaction.

2. The promise to indemnify is not an insurance product.

Under the Insurance Code, the term "insurance" means "an arrangement, contract, or plan *for* the transfer of a risk or risks from one or more persons to one or more other persons[.]" *Utah Code § 31A-1-301(93) (emphasis added)*. In this case, the mortgage lender's agreement with the producer is for settlement services in real estate transactions. Although this contract will require the producer

to indemnify, this obligation is ancillary to and does not reflect the primary purpose of the agreement: obtaining settlement services. Because the lender/producer contract is for settlement services, not indemnification, the contract is not an insurance product.

This conclusion follows the decision in *Stickovich v. City of Cleveland*, 143 Ohio App.3d 13, 27-28, 757 N.E.2d 50, 61 (2001). In that case, a commercial contract included a term that required one party to indemnify the other for certain losses. The court ruled that the contract was not insurance even though it contained an indemnification provision. According to the court, an agreement must have risk transfer as its primary purpose in order to constitute insurance. Because the promise to indemnify was merely one term in a broader commercial contract, the contract was not insurance. *Id.*

The Department's guidance in Bulletins 2010-8 and 2012-1 is not inconsistent with the direction provided here. The prior Bulletins address a producer who certifies that a lender has a valid first lien. This certification, according to the Bulletins, is "beyond the authority of the title insurance producer" because it does not fall within the statutory scope of escrow duties. *Bulletin 2012-1*. Those duties are explaining, holding, or creating documents or receiving, depositing, or disbursing money. *Utah Code § 31A-1-301(63)*. Because a producer who certifies first position is acting beyond the scope of statutory escrow authority, the Bulletins state that the producer is acting as an "unauthorized insurer." *Utah Code § 31A-1-301(186)*.

By contrast, a producer who deposits and disburses money as part of escrow is acting within the scope of legal authority. *Utah Code § 31A-1-301(63)* (*escrow includes receiving, depositing or disbursing money*). And under the mortgage lender's proposal, the indemnification promise ties directly to that authorized activity; the producer indemnifies for "loss of monies incurred by Lender in connection with the settlement and disbursement" of money. Because the certification exceeds the producer's legal escrow authority to act and the indemnification does not, the reasoning in Bulletins 2010-8 and 2012-1 does not apply to the indemnifying producer.

In summary, nothing prohibits a title insurance producer from entering into a contract like the one described here. The lender's use of an AOL is not problematic as long as the producer issues an owner's title insurance policy as part of the transaction. And the CIL is not unauthorized insurance because it: (a) is an ancillary promise to the agreement for settlement services; and (b) falls within the scope of a producer's statutory authority to conduct escrow.

Please address questions about this Bulletin to Reed Stringham (rmstringham@utah.gov), Tracy Klausmeier (tklausmeier@utah.gov) or Adam Martin (gmartin@utah.gov).

DATED this 1st day of March 2023.



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