

# Fill the Gap Between You and Your Property Rights

**Emerging Issues in Title Insurance** 

August 12, 2015 Hallman B. Eady Spencer R. Mobley



babc.com Alabama i district of columbia i florida i mississippi i north carolina i tennessee

#### **Overview**

- Contemplating Risk at Origination
- Closing Protection Letter Indemnity
- Title Insurance Coverage
  - Standard Provisions
  - Endorsements to Consider
- Considerations after Closing



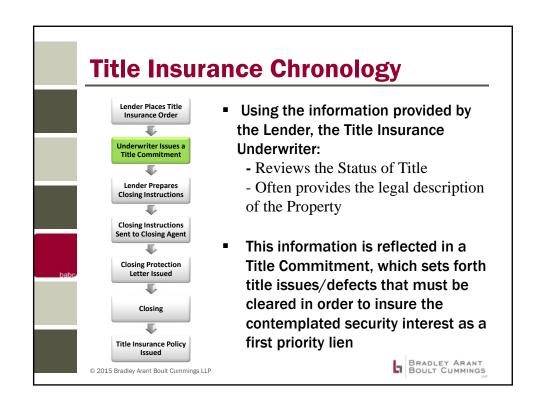
# **Protecting Your Collateral Begins at Origination**

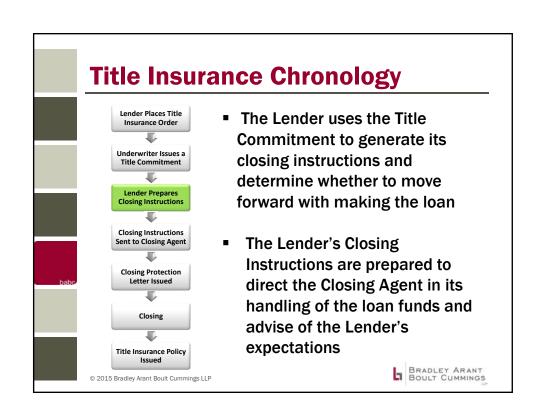
- Allocations of Risks in a Loan Transaction
  - Credit Risks → Lender
  - Closing Table Risks → Title Insurance Underwriter
  - Title Risks → Title Insurance Underwriter

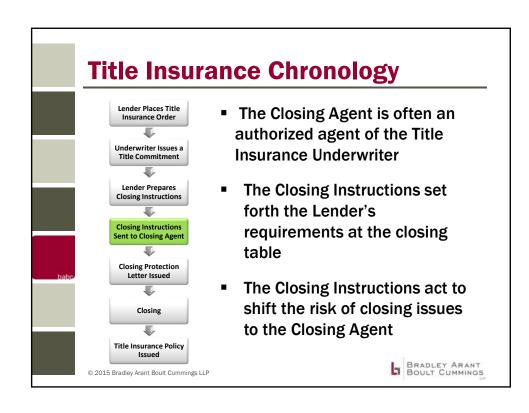
© 2015 Bradley Arant Boult Cummings LLP

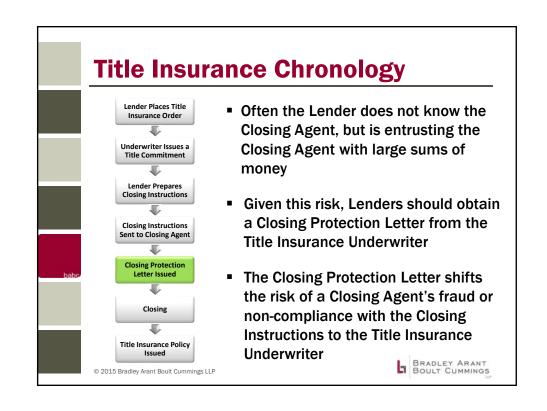
BRADLEY ARANT BOULT CUMMINGS

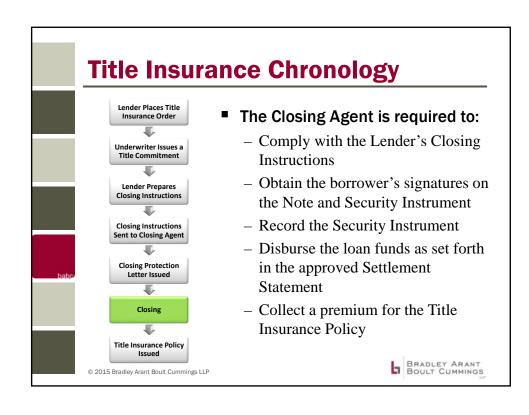
#### **Title Insurance Chronology** Lender places a title insurance **Insurance Order** order by providing certain basic Underwriter Issues a information to the Title Insurance **Title Commitment Underwriter:** Lender Prepares Closing Instructions - Borrower/Property Owner Name - Property Address **Closing Instructions** Sent to Closing Agent The Lender does not typically Closing Protection have the legal description of the Letter Issued **Property** Closing Title Insurance Policy BRADLEY ARANT BOULT CUMMINGS © 2015 Bradley Arant Boult Cummings LLP

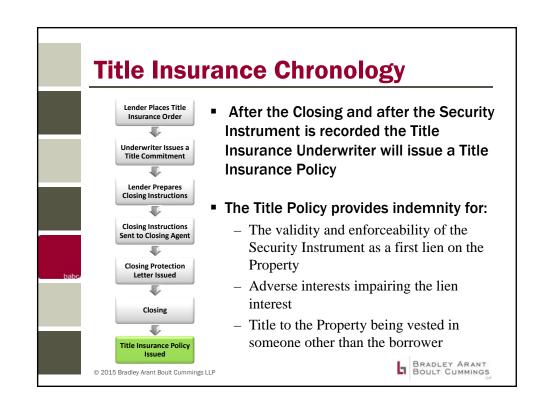


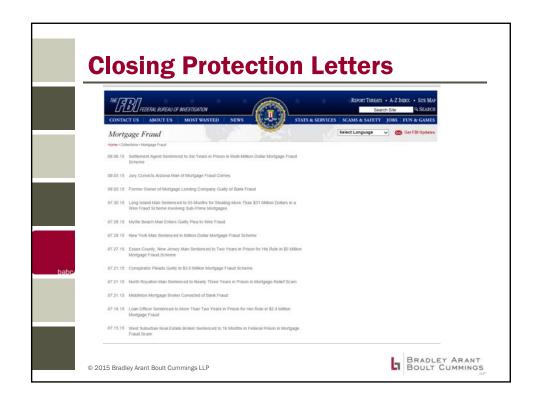


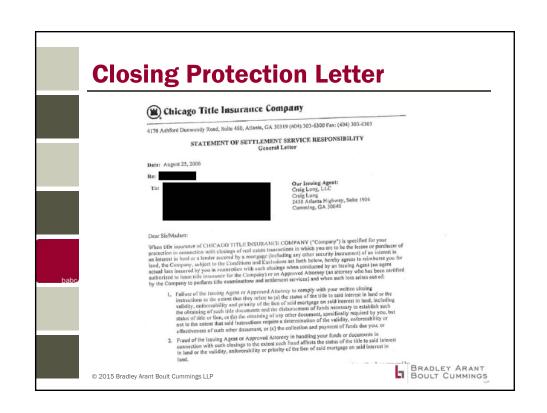












## **Closing Protection Letters**

- A CPL is an integral part of risk allocation at the closing table
- "The CPL is the means by which a title insurer 'quell[s] a lender's understandable fear of entrusting an unknown agent with large sums of money and important legal documents."

© 2015 Bradley Arant Boult Cummings LLP

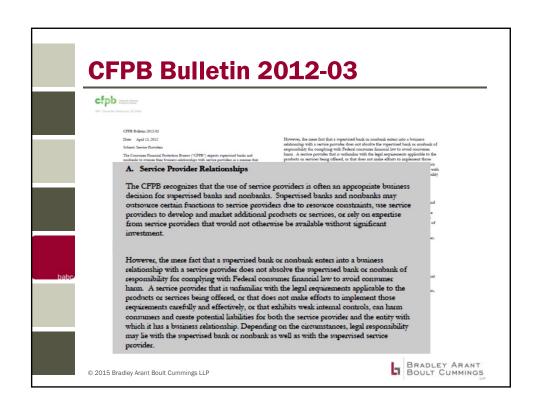


#### CFPB Bulletin 2012-03

- On April 13, 2012, the CFPB issued
  Bulletin 2012-03 regarding Service
  Providers, which includes closing agents
- Service Provider: "any person that provides a material service to a covered person of a consumer financial product or service"



<sup>—</sup> Regions Bank v. Stewart Title Guar. Co., 2015 WL 433486, at \*5 (D.S.C. Feb. 3, 2015) (quoting F.D.I.C. v. Attorneys' Title Ins. Fund, 2014 WL 4384270, at \*4 (S.D. Fla. Sept.3, 2014))



#### **Closing Protection Letters**

- A CPL and a Title Policy are distinct and wholly separate in terms of the indemnity provided
- A CPL is an indemnity contract, which provides indemnity for a Closing Agent's:
  - Failure to follow the lender's closing instructions
  - Fraud or dishonesty in handling loan funds in connection with the closing

# **Closing Protection Letters**

- Provides indemnity for a lender's <u>actual</u> loss
  - Net realization calculation
    - The outstanding loan balance less the sales proceeds of the collateral property.
    - See F.D.I.C. v. First American Title Ins. Co., No. 13-15058, 2015 WL 1906139 (11th Cir. Apr. 28, 2015); FDIC v. Property Transfer Services, Inc., 2013 WL 5535561, at \*16; First American Title Ins. Co. v. Vision Mortgage Corp., 689 A.2d 154 (N.J. Super. Ct. App. Div. 1997).
    - Intended to make the lender whole

© 2015 Bradley Arant Boult Cummings LLP



#### **Recent CPL Trends**

- The FDIC as the receiver for failed banks is aggressively pursuing CPL indemnity based on closing agents' failure to comply with closing instructions, fraudulent appraisals and sham transactions
- The definition of actual loss has been decided by the 6<sup>th</sup> and 11<sup>th</sup> Circuits



#### **Recent CPL Trends**

- The notice provision in the Florida form CPL, which requires notice within 90 days of the date of loss, will likely be decided in a current appeal pending in the 11<sup>th</sup> Circuit
  - FDIC v. Attorneys' Title Ins. Fund, Inc., Appeal No. 15-11466
- Title Insurers are trying to limit the scope of the CPL
  - To one property
  - To fraud on the part of the closing agent

© 2015 Bradley Arant Boult Cummings LLP

BRADLEY ARANT BOULT CUMMINGS

#### **CPL Takeaways**

- Request a CPL as part of the closing
- As part of the foreclosure process, review the loan for errors at the closing table

© 2015 Bradley Arant Boult Cummings LLP

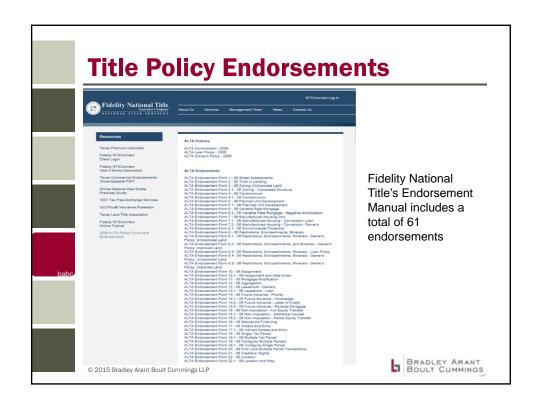
BRADLEY ARANT BOULT CUMMINGS

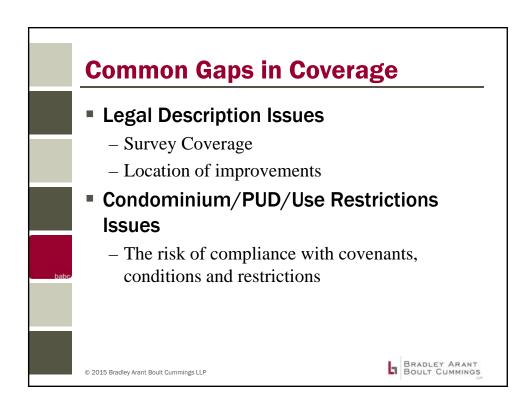


## **Title Insurance Policies**

- Secondary market sales require mortgages to be valid and enforceable first priority liens
- Secondary market purchasers allocate lien enforceability risks to originating/selling lender
- Shift the risk of title defects to the title insurer







# **Filling the Gaps: Endorsements**

#### Legal Description Issues

- Remove any survey exclusion in the Title Policy
- Request a Location Endorsement (ALTA 22.1)
  - Provides coverage for loss arising from a variation in the street address and the location of improvements

© 2015 Bradley Arant Boult Cummings LLP

BRADLEY ARANT BOULT CUMMINGS

## **Filling the Gaps: Endorsements**

#### Legal Description Issues

- Request tax parcel coverage (ALTA 18-06)
  - Provides coverage in the event that the tax parcel identification number shown does not include all of the Land described in the policy or includes land not described in the policy
- Perform a survey at origination



## **Filling the Gaps: Endorsements**

- Condominium/PUD/Use Restrictions Issues
  - Condominium and PUDs are governed by restrictions placed on the owners
  - The Condominium Endorsement (ALTA 4) and PUD endorsement (ALTA 5) shift the risk of CC&R violations to the title insurer

© 2015 Bradley Arant Boult Cummings LLP



# **Considerations After Closing**

#### Continuation of Insurance

ALTA Loan Policy 1992

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.



## **Considerations After Closing**

#### Continuation of Insurance

- Where there is an investor on a loan, after foreclosing a servicer may decide to quit claim the property to the investor after closing
- This quit claim may terminate the title policy

#### Solutions

- Review loan file for title issues before conveying title
- Acquire an owner's title policy after foreclosure

© 2015 Bradley Arant Boult Cummings LLP



## **Considerations After Closing**

#### Timely Claims Submission

- One of the first things a title insurer reviews upon receiving a claim is whether the claim was timely
- The Title Policy allows an insurer to reduce its liability to the extent of the prejudiced cause by any untimely notice.

#### Solutions

- If the claim arises out of litigation, tender a claim as soon as possible
- Be diligent in reviewing loan files for title issues early in the foreclosure process



# **Considerations After Closing**

#### Full Credit Bids

- At foreclosure, the lender has the option to full credit bid
- Title insurers have attempted to argue that a full credit bid reduces a lender's loss to zero since there is no outstanding amount due on the note

© 2015 Bradley Arant Boult Cummings LLP

BRADLEY ARANT BOULT CUMMINGS

## **Considerations After Closing**

- Full Credit Bid—Recent Decisions Rejecting Full Credit Bid Rule
  - Bank of Idaho v. First Am. Title Ins. Co., 156 Idaho
    618, 622, 329 P.3d 1066, 1070 (2014) ("all payments made" under Section 2(c)(ii) do not include a full credit bid by the insured at a trustee's sale)
  - Preservation Capital Consultants, LLC v. First Am.
    Title Ins. Co., 751 S.E.2d 256 (S.C. 2013) (declined to use the full credit bid as a bar to recovery)

© 2015 Bradley Arant Boult Cummings LLF

BRADLEY ARANT BOULT CUMMINGS

## **Considerations After Closing**

- Full Credit Bid—Recent Decisions **Applying Full Credit Bid Rule** 
  - Equity Income Partners LP v. Chicago Title Ins. Co., No. CV-11-1614-PHX-SMM, 2013 WL 6498144, at \*8 (D. Ariz. Dec. 11, 2013)
  - "The Court finds that Plaintiffs' full-credit bids constitute payment under Paragraph nine of the Policies. Arizona statutes and precedent leave no doubt that when a lender acquires property pursuant to their full-credit bid, they are paying to themselves the entire amount of unpaid principal, interest, and associated fees—as a result, both the security interest and borrower's debt are extinguished." BRADLEY ARANT BOULT CUMMINGS

© 2015 Bradley Arant Boult Cummings LLP

# **Questions?**

Hall Eady 205.521.8375 heady@babc.com

**Spencer Mobley** 205.521.8245 heady@babc.com



