OPINION LETTERS vs. TITLE INSURANCE

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In June, Freddie Mac and Fannie Mae announced that they would no longer be requiring lenders to obtain title insurance as a requirement for issuing the majority of their loans. The policy change is an attempt to eliminate upfront fees in a loan transaction, thereby making home ownership more accessible to underserved communities. Instead, they would require an Attorney Opinion Letter (AOL) in lieu of lender’s title insurance. Fannie Mae has set out requirements for the AOL making it much more than a mere title summary: B7-2-06, Attorney Title Opinion Letter Requirements (04/06/2022) (fanniemae.com)

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The attorney preparing the AOL must, among other things, agree to indemnify Fannie Mae for all losses attributable to negligence in preparing the opinion. The attorney must also provide the gap coverage for the period between the AOL and the recordation of the mortgage. The AOL must also provide coverage provided by ALTA Endorsement 8.1 (Environment Protection Lien). The AOL must not except to matters of survey, and on, and on, and on. Typically, when read closely, the errors and omissions insurance policies held by attorneys do not cover the opinions and assurances required in an AOL. In this way, title insurance not only provides coverage to lenders and owners, but also to the attorneys being asked to write these letters.

Unlike attorney opinion letters, title insurance goes beyond a public records search. Title insurance policies insure against unknown risks that are not discoverable during searches of public records. Some of these unknown risks could include fraud, forgery,

mis-indexed items, errors in surveys, encroachments, boundary disputes, undisclosed or missing heirs, errors on the deed, among other risks. View comparisons and additional resources on ALTA’s webpage regarding this topic: <https://www.alta.org/advocacy/risks-of-alternatives-to-title-insurance.cfm>. These risks are insured by title insurance companies that have state-required reserves to cover claims. It is the purpose of these companies to take risks and insure title matters to facilitate transactions that otherwise may have preventative title defects. Title insurance companies have many arrows in their quiver to cure these types of defects, including the ability to negotiate using title claims experts and litigate using professional title attorneys. An AOL does not have any of these benefits.

An AOL provides no coverage to the homeowner. In most cases, a homeowner does not understand the potential risks to his title until there is a problem. Without the remedies provided by title insurance, the owner is left to pay the cost to cure the title defect on his own. The financial burden of litigating these title matters may pose a significate risk to owners, possibly forcing them into foreclosure or bankruptcy.

The benefits and security of a traditional title insurance policy far outweigh any cost savings realized by substituting an Attorney Opinion Letter.