

1 State of Arkansas  
2 88th General Assembly  
3 Regular Session, 2011  
4

# A Bill

SENATE BILL 309

5 By: Senators Teague, Burnett, Crumbly, J. Dismang, D. Wyatt, J. Hutchinson, J. Jeffress, Rapert  
6 By: Representatives Williams, Vines, Carnine, Catlett, E. Elliott, King, Lovell, Murdock, Patterson,  
7 Woods, Westerman  
8

## For An Act To Be Entitled

10 AN ACT TO REGULATE THE ISSUANCE OF CLOSING PROTECTION  
11 LETTERS; AND FOR OTHER PURPOSES.  
12  
13

### Subtitle

15 TO REGULATE THE ISSUANCE OF CLOSING  
16 PROTECTION LETTERS.  
17  
18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
20

21 SECTION 1. Arkansas Code § 23-103-402 is amended to read as follows:  
22 23-103-402. Definitions.

23 As used in this subchapter:

24 (1) "Closing" means ~~the process of executing documents~~ in  
25 connection with a transaction involving either personal or real property,  
26 including the transfer of title or creation of a lien on the title, ~~or the~~

27 (A) collection ~~Collection~~ and disbursement of funds ~~in~~  
28 connection with the transaction and title insurance premiums out of escrow;  
29 or

30 (B) Process of executing documents;

31 (2) "Closing agent" means a person that facilitates a closing  
32 ~~for a fee;~~

33 (3) "Depositor" means the person providing funds or documents  
34 for delivery to a depository in connection with a transaction involving real  
35 property;

36 (4) "Depository" means a title insurer, title insurance agency,



1 closing agent, or qualified financial institution receiving a deposit of  
 2 funds or documents;

3 (5) "Escrow" means the act or process of providing closing  
 4 services or services pursuant to an escrow agreement ~~by a title insurer or~~  
 5 ~~title insurance agency~~;

6 (6) "Escrow account" means the demand deposit account maintained  
 7 by a title insurer or title insurance agency at a qualified financial  
 8 institution into which the title insurer or title insurance agency deposits  
 9 and disburses funds collected from any person that is or will be a party to a  
 10 transaction involving real property;

11 (7) "Person" means an individual or any partnership,  
 12 association, cooperative, corporation, firm, trust, limited liability  
 13 company, or other legal entity;

14 (8) "Qualified financial institution" means a bank, credit  
 15 union, or savings and loan association regulated, supervised, or examined by  
 16 federal or state authorities having regulatory authority over banks and trust  
 17 companies;

18 (9) "Risks" means the danger or hazards of a loss by  
 19 encumbrance, a defective or invalid title, or adverse claim to title covered  
 20 under a title insurance policy;

21 (10) "Title insurance agency" means a person that has an agency  
 22 contract under § 23-103-407 with a title insurer;

23 (11)(A) "Title insurance agent" means an individual affiliated  
 24 with a title insurance agency who is authorized on behalf of a title insurer  
 25 to issue a title insurance report or title insurance policy and is:

26 (i) A resident of the State of Arkansas licensed  
 27 under § 23-64-101 et seq.; or

28 (ii) A nonresident individual licensed under § 23-  
 29 64-101 et seq. and employed by a resident licensee.

30 (B) "Title insurance agent" does not include:

31 (i) An individual employed by a title insurance  
 32 agency that does not sell or negotiate title insurance but who performs  
 33 marketing duties under the supervision of a title insurance agent; ~~or~~

34 (ii) An individual employed by a title insurance  
 35 agency that is a closing agent and does not solicit, sell, or negotiate title  
 36 insurance; or

1 (iii) A closing agent that provides closing services  
2 but does not otherwise engage in title insurance business in the State of  
3 Arkansas;

4 (12)(A) "Title insurance business" means:

5 ~~(A)(i)~~ Issuing or offering to issue as an insurer a  
6 title insurance policy or closing protection letter;

7 ~~(B)(ii)~~ Transacting or proposing to transact any of  
8 the following activities when conducted or performed in contemplation of or  
9 in conjunction with the issuance of a title insurance report or policy:

10 ~~(i)(a)~~ Guaranteeing, warranting, or otherwise  
11 insuring the status of title, liens, encumbrances, or other matters of  
12 record;

13 ~~(ii)(b)~~ Executing title insurance policies;

14 ~~(iii)(c)~~ Effecting contracts of reinsurance;

15 ~~(iv)(d)~~ Underwriting titles; or

16 ~~(v)(e)~~ Collecting, disbursing, or receiving  
17 title insurance premiums, unless incidental to serving as a closing agent; or

18 ~~(C)(iii)~~ Doing or proposing to do any business  
19 substantially equivalent to the matters described in this subdivision (12) in  
20 a manner designed to evade this subchapter.

21 (B) "Title insurance business" does not include:

22 (i) A closing or escrow; or

23 (ii) The activities of a closing agent or other  
24 party performing a closing or escrow;

25 (13) "Title insurance policy" means a contract, including any  
26 coverage, enhancements to coverage, or endorsements, insuring or indemnifying  
27 owners of or other persons lawfully interested in personal or real property  
28 against loss or damage arising from any of the following conditions existing  
29 on, before, or subsequent to the policy date and not specifically excepted or  
30 excluded:

31 (A) Defects in or liens or encumbrances on the insured  
32 title;

33 (B) Unmarketability of the insured title;

34 (C) Invalidity or unenforceability of liens or  
35 encumbrances on the insured title of the personal or real property;

36 (D) Title being vested other than as stated in the policy;

1 (E) Lack of a legal right of access to the land that is  
2 part of the insured title in a policy relating to real property;

3 (F) Lack of priority of the lien of any insured mortgage  
4 over any statutory lien for services, labor, or materials as specifically  
5 described in the policy;

6 (G) Invalidity or unenforceability of any assignment of an  
7 insured mortgage subject to certain conditions; or

8 (H) The priority of any lien or encumbrance over the lien  
9 of an insured mortgage;

10 (14)(A) "Title insurance premium" means the funds paid to the  
11 title insurer and to an appointed title insurance agency as consideration for  
12 the amount of liability assumed by a title insurer under a title insurance  
13 policy, including all amounts retained by the title insurance agency pursuant  
14 to the title insurance agency's contract with the title insurer.

15 (B) "Title insurance premium" does not include charges for  
16 the performance of services related or incidental to title insurance or  
17 closings that are disclosed to the person charged, including without  
18 limitation:

19 (i) Title search, abstracting, or title examination  
20 ~~of title~~ fees;

21 (ii) ~~Obtaining a title~~ Title opinion fees;

22 (iii) Document preparation fees;

23 (iv) Escrow or closing fees;

24 (v) Notary fees;

25 (vi) Attorney's fees;

26 (vii) Fees incurred to cure defects in title;

27 (viii) Tax report or tax certification fees;

28 (ix) Title report fees;

29 (x) Processing fees;

30 (xi) Courier fees; and

31 (xii) Fees incident to the issuance of a title  
32 insurance report or policy;

33 (15) "Title insurance report" means a preliminary report,  
34 commitment, or binder issued before the issuance of a title insurance policy  
35 containing the requirements, terms, conditions, exceptions, and any other  
36 matters incorporated by reference under which a title insurer is willing to

1 issue a title insurance policy;

2 (16) "Title insurer" means a company authorized under the laws  
3 of this state to transact title insurance business; and

4 (17) "Underwrite" means the acceptance or rejection of risk on  
5 behalf of the title insurer.

6

7 SECTION 2. Arkansas Code § 23-103-403 is amended to read as follows:  
8 23-103-403. Requirement for license.

9 (a)(1) Only Except as provided in subdivision (a)(1) of this section  
10 and § 23-103-404, only an appointed title insurance agency licensed under §  
11 23-64-101 et seq. shall issue title insurance policies, reports, or otherwise  
12 transact ~~the business of~~ title insurance business.

13 (2) An appointed title insurance agency licensed under § 23-64-  
14 101 et seq. shall not issue closing protection or issue as an insurer a title  
15 insurance policy.

16 (b) All title insurance policies and reports covering an insurable  
17 interest in title to real property located in this state shall be signed by a  
18 title insurance agent:

- 19 (1) Properly appointed by a title insurer;
- 20 (2) Affiliated with a title insurance agency; and
- 21 (3) Licensed in this state under this subchapter.

22

23 SECTION 3. Arkansas Code § 23-103-404 is amended to read as follows:  
24 23-103-404. Authorized activities of title insurers.

25 (a) Subject to the exceptions and restrictions contained in this  
26 subchapter, a title insurer may:

- 27 (1) Transact only title insurance business;
- 28 (2) Reinsure title insurance policies; and
- 29 (3) Unless prohibited by the Insurance Commissioner, perform or  
30 cause to be performed ancillary activities whether or not in contemplation of  
31 or in conjunction with the issuance of a title insurance report or policy  
32 including:

33 (A) Underwriting title to and furnishing related  
34 information about personal property or real property; and

35 (B) Procuring and furnishing information about relevant  
36 personal property.

1           (b) Only a title insurer may issue closing protection or issue as an  
2 insurer a title insurance policy.

3  
4           SECTION 4. Arkansas Code § 23-103-405 is amended to read as follows:  
5           23-103-405. Title insurers – Limitation of authority – Powers.

6           (a)(1) An insurer that transacts any class, type, or kind of insurance  
7 other than title insurance is not eligible for the issuance or renewal of a  
8 license to transact title insurance business in this state.

9           (2) Title insurance shall not be transacted, underwritten, or  
10 issued by any insurer transacting or licensed to transact any other class,  
11 type, or kind of business.

12           (b) A title insurer shall not engage in the business of guaranteeing  
13 payment of the principal or the interest on bonds or mortgages.

14           (c)(1) Notwithstanding subsection (a) of this section, a title ~~insurer~~  
15 insurance agent shall give notice of availability of closing protection to  
16 all parties to a transaction in which it is contemplated that title insurance  
17 may be issued.

18           (2) Upon written request by a party to a closing with a licensed  
19 title insurance agency with which the title insurer has an agency contract,  
20 the title insurer shall issue a closing protection letter to the requesting  
21 party.

22           (3)(A) Except as provided in subdivision (c)(3)(C) of this  
23 section, upon written request by a party to a closing conducted by a person  
24 that is not a licensed title insurance agency, the title insurer may at its  
25 discretion issue closing protection to the requesting party if the title  
26 insurer and the closing agent are in privity of contract.

27                   (B) The contract shall:

28                                 (i) Affirmatively state that the title insurer will  
29 provide liability coverage for the actions of the closing agent to the extent  
30 provided in the closing protection letter; and

31                                 (ii) Require the closing agent to make its books and  
32 records available to the title insurer for each transaction in which a  
33 closing protection letter is issued by the title insurer on behalf of the  
34 closing agent except to the extent the books and records are privileged under  
35 the attorney-client privilege or otherwise.

36                   (C) The contract requirements contained in subdivisions

1 (c)(3)(A) and (B) do not apply if the closing occurs outside the State of  
2 Arkansas and the closing agent is licensed or otherwise authorized to conduct  
3 a closing in the state where the closing occurs.

4 ~~(3)~~(4) The closing protection shall conform to the terms of  
5 coverage and form of instrument as may be filed with the Insurance  
6 Commissioner and shall indemnify a person solely against loss of closing  
7 funds because of the following acts of a closing agent, title insurer's named  
8 employee, or title insurance agency:

9 (A) Theft or misappropriation of closing funds; or

10 (B) Failure to comply with written instructions from the  
11 proposed insured when agreed to by the closing agent, employee, or title  
12 insurance agency as it relates to the status of the title to the interest in  
13 land or to the validity, enforceability, and priority of the lien of a  
14 mortgage or deed of trust on the interest in land.

15 ~~(4)~~(5) The form and amount charged by a title insurer for  
16 closing protection coverage shall be filed with the commissioner at least  
17 twenty (20) days before the first use of closing protection coverage in the  
18 market.

19 ~~(5)~~(6) Except as provided in this section, a title insurer shall  
20 not provide any other coverage that purports to indemnify against improper  
21 acts or omissions of a person with regard to escrow or closing services.

22 (7) A title insurer shall not issue a closing protection letter  
23 unless the title insurer contemplates issuing a title insurance policy to a  
24 party to the transaction.

25 (8) Issuing closing protection is not a form of insurance or a  
26 violation of § 23-103-404.

27  
28 SECTION 5. Arkansas Code § 23-103-411(a)(1), concerning the annual  
29 audits of title insurance agencies by title insurers, is amended to read as  
30 follows:

31 (a)(1) At least one (1) time each year, a title insurer shall conduct  
32 an on-site audit of the escrow and closing practices related to the issuance  
33 of title insurance policies ~~and closing protection letters~~, escrow accounts,  
34 security arrangements, files, underwriting and claims practices, and policy  
35 inventory of the title insurance agencies that the title insurer has  
36 authorized to issue title insurance reports or policies on its behalf.