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# Making the Old New Again: The Resurgence of Attorney Opinion Letters as an Alternative to Title Insurance

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## I. Executive Summary

Before the advent of title insurance, attorney opinions of title were the sole form of risk management for title issues related to conveyances of land. However, there were limited options for recovering losses from the attorneys issuing the opinions. These limitations, and increased demand for coverage of losses associated with title defects, resulted in the emergence of title insurance. Attorney opinion letters (“AOLs”) and title insurance are similar products, but they have historically diverged with respect to coverage of defects that cannot be ascertained by simply reviewing the land records, and with regard to the protection of successors-in-interest to the property. However, in recent years, alternative products have emerged that are modeled after traditional AOLs, but also include certain enhanced coverage features.

The government-sponsored enterprises (“GSEs”) have been seeking ways to reduce barriers to homeownership for low-income individuals by cutting closing costs. Title insurance is often one of the largest closing costs paid by a homeowner, and Fannie Mae and Freddie Mac have both announced their willingness to accept AOLs in lieu of title insurance, provided certain conditions are met. However, the rollout of these programs has been limited thus far.

Both the Fannie Mae and Freddie Mac Selling Guides contain various restrictions on their acceptance of AOLs, including limitations on the types of loans and properties that are eligible for AOLs. AOLs must also be a “commonly acceptable” alternative to title insurance in the given region, which significantly limits the ability to scale utilization of AOLs.

Voxtur Analytics Corp. (“Voxtur”) offers an enhanced AOL product called Voxtur AOL, which it markets as a full-coverage alternative to title insurance. Voxtur representatives were willing to speak with us regarding this product and provided a significant amount of information and materials for us to review. For this reason, we focused on the Voxtur AOL in our comparison of AOLs to traditional title insurance. United Wholesale Mortgage’s TRAC (“UWM TRAC”) is a similar product to Voxtur AOL in that it is

intended to serve as an alternative to title insurance and involves an attorney opinion of title. However, it is offered by UWM for the benefit of holders of UWM paper only, and is not offered to borrowers, who must obtain separate coverage. Essentially, UWM self-insures its loans.

Enhanced AOL products have received criticism for offering less protection to lenders and consumers, and some critics have implied that providers of enhanced AOL products are essentially operating as unregulated title insurers. State regulators have yet to publicly weigh in on these claims, and they may do so in the future, but it is unlikely that they would invalidate existing AOLs or underlying errors and omissions (“E&O”) policies, as doing so would leave consumers unprotected.

The Voxtur AOL assures that title to the property is “marketable” and subject only to the Subject Mortgage. Like other AOLs, the Voxtur AOL also contains separate sections setting forth certain Assumptions and Exceptions, which further impact the scope of coverage provided. It is unclear what would be required to remove some of the Exceptions, as Endorsements cannot be added for this purpose as they can be added to a traditional title insurance policy. The scope of coverage is further limited by certain Qualifications in the Voxtur AOL.

Providers of enhanced AOL products claim that these products are more cost effective than traditional title insurance. Fannie Mae reports average consumer savings of \$1,034 in the 45 AOL loans they purchased in 2022. However, this small sample size is anecdotal, and it is difficult to estimate any potential savings in connection with a nationwide rollout. The wide divergence in the cost of title insurance across states also cuts against any sweeping claims of affordability of AOLs as a national alternative to title insurance.

Voxtur claims that its Voxtur AOL differs significantly from traditional AOLs with respect to the treatment of claims. These distinctions include claims that coverage extends to successors in interest of the original beneficiaries, that these beneficiaries can file claims directly with the E&O insurer without first foreclosing or establishing negligence of the attorney, and that the E&O insurer has a duty to defend the beneficiary in litigation involving a covered issue. We found these claims to be generally accurate; however, we identified Voxtur AOL’s \$50,000 cap on “Claim Expenses” per “Incident” to be a potential risk for borrowers and lenders to consider when purchasing a Voxtur AOL.

Enhanced AOL products offer more coverage than their traditional AOL predecessors. However, these products cannot “insure” against unknowable risks, and the lack of Endorsements to supplement enhanced AOL products creates additional gaps in coverage between these products and traditional title insurance. With that said, title defects are relatively rare, and some consumers and lenders may be willing to assume these risks where cost savings can be achieved through purchasing an enhanced AOL in lieu of a title insurance policy. Others may prefer more certainty and greater protection. For these reasons, we believe that there is room for both types of products to exist in today’s market.

## II. The History of Attorney Opinion Letters and the Evolution of Title Insurance

- **Before the advent of title insurance, attorney opinions of title were the sole form of risk management for title issues related to conveyances of land. However, there were limited options for recovering losses from the attorneys issuing the opinions. These limitations, and increased demand for coverage of losses associated with title defects, resulted in the emergence of title insurance.**

Attorneys served as the first form of risk management for the marketability of title to land. The exact genesis of the attorney as title insurer is unknown but the use of attorneys predates title insurance. Upon a request from a buyer, attorneys would either prepare their own title abstract (a task that they eventually delegated to a “lay investigator” because the task was “largely clerical, excessively tedious, and time consuming”) or obtain one (from sources such as public records or a title plant) and any or other relevant title information, analyze that information, and then provide a written legal opinion as to the state of the title.<sup>1</sup> This process was derived from a system employed in England.<sup>2</sup> These written opinions were often referred to as a title certificate or, the now more common term, attorney opinion letter (“AOL”).

Until the arrival of title insurance, an AOL was the only means of protecting a real estate investment.<sup>3</sup> Prior to the late 19<sup>th</sup> Century, the residential real estate market was highly localized, which at times negated the need for formal record keeping.<sup>4</sup> Thus, it is not surprising that a local attorney, one presumably trained in real estate transactions, was the natural choice for minimizing risk.<sup>5</sup>

Although better than nothing, this method provided a purchaser with only limited protection against possible future losses due to a flawed title. This is because, with a traditional AOL, the attorney can only be held responsible for the analysis of the information available—the AOL only promises that the attorney has completed his or her review in a professional manner pursuant to the opinion-writing norms established by and followed in the relevant legal community.<sup>6</sup> Thus, the purchaser would only have a malpractice claim against the attorney and would have to show that the attorney was negligent, a high bar in drafting the AOL. Accordingly, under the traditional AOL, there is no liability for defects that could not be discovered with reasonable care.

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<sup>1</sup> John C. Payne, *In Search of Title*, 14 ALA. L. REV. 11, 35-36 (1961).

<sup>2</sup> *Id.* at 29-30.

<sup>3</sup> Clay boundary markers dating back to 3000 BC were uncovered in the Euphrates River Valley showing the inherent need to protect one’s real property. Charles B. DeWitt, III, *Title Insurance: A Primer*, 3 TENN. J. PRAC. & PROC. 15, 15 (2000).

<sup>4</sup> For example, an abstract from 1869 lists a deed from a Cornelius Vanderhaven to Peter Vendervoort of a tract of land in Brooklyn, dated December 29, 1727, but not recorded until fifty years later. Daniel D. Gage, Jr., *Land Title Assuring Agencies in the United States*, 40 (1937).

<sup>5</sup> Michael Braunstein and Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 473 (1991).

<sup>6</sup> Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner’s Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN’S L. REV. 407, 438 (2000).

Additionally, an AOL could not protect against hidden risks such as forgeries or even the negligence of the public recorder. Because an attorney could not be liable for malpractice in connection with these issues, it was difficult for injured parties to identify a liable person and recover damages.<sup>7</sup>

In 1868, the case of *Watson v. Muirhead*, “the greatest single force in changing the whole aspect of title-assuring methods,” accelerated the advent of title insurance.<sup>8</sup> Similar to the AOL process described above, the Commonwealth of Pennsylvania permitted non-lawyer conveyancers to facilitate real estate transactions, but the conveyancers would often obtain a lawyer’s opinion before rendering a final report of the title. Watson, the buyer, hired Muirhead, a conveyancer, to advise him on a purchase of land in Philadelphia. Muirhead located a judgment lien against the property and then consulted a lawyer who advised him that the judgment was not a valid lien against the property. Based upon this advice, Watson purchased the property but later found that the liens were valid and enjoyed priority over his title. Watson sued Muirhead for his flawed advice, but the Pennsylvania Supreme Court held that Muirhead was not liable because he relied upon the lawyer’s opinion. Of course, this outcome was welcomed by conveyancers, but it also weakened the public’s faith in the title assurance industry, particularly in Pennsylvania, where conveyancers predominated due to a lack of lawyers. The fact that a conveyancer could escape liability was seen as a problem in need of an immediate solution.

With *Muirhead* perhaps still fresh in their minds or due to an increase in real estate transactions related to the Centennial Exposition of 1876, a group of conveyancers in Philadelphia established the Real Estate Title Insurance Company, which was the first group to issue a guarantee of title with a specific indemnity clause, now called title insurance.<sup>9</sup> The practice soon spread to other cities such as New York with the organization of the Title Guarantee and Trust Company in 1883.<sup>10</sup> By 1920, at least 90 such companies had sprouted across the country in 33 states.<sup>11</sup> Title insurance was aimed at correcting one of the fundamental shortcomings of AOLs highlighted in *Watson v. Muirhead*—the limited recourse against the attorney if an AOL was flawed.

The spread of title insurance was aided by another form of insurance—life insurance. After World War I, life insurance companies and other institutional investors began investing in mortgages and saw title insurance as a way to better protect their investment.<sup>12</sup> However, the decision to offer both title and mortgage insurance devastated the industry during the Great Depression.

The mortgage lending industry eventually rebounded, aided greatly by the Federal Housing Administration (“FHA”) and the government’s backing of mortgages and other initiatives aimed at making mortgages more affordable for a larger portion of the population. As banks increased their portfolios of mortgage-backed paper, they demanded more security. In turn, they became less willing to rely on local

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<sup>7</sup> Hugh A. Brodkey, *Land Title Issues for Countries in Transition: The American Experience*, 29 J. MARSHALL L. REV. 799, 806 (1996).

<sup>8</sup> *Watson v. Muirhead*, 57 Pa. 161 (1868); see also Daniel D. Gage, Jr., *Land Title Assuring Agencies in the United States*, 80 (1937).

<sup>9</sup> The earliest mention of title insurance was in 1851, although it was intended only for properties with visibly defective titles.

<sup>10</sup> See Gage at 82.

<sup>11</sup> *Id.* at 84.

<sup>12</sup> Stewart E. Sterk, *Title Insurance: Protecting Property at What Price*, 99 WASH. U. L. REV. 519, 526 (2021).

lawyers to assure title and instead turned to regional and national title insurance companies. Although attorneys attempted to thwart the encroachment of insurers into their domain, their attempts ultimately failed, and title insurance became the predominant means for assuring title.<sup>13</sup> The country's westward expansion also necessitated the need for title assurance via means other than an AOL. There were simply not enough attorneys to keep up with the demand as more people bought property.<sup>14</sup> The scalable nature of title insurance enabled this product to keep pace with growing demand in a way that attorneys could not.

### III. Comparison of Traditional AOLs to Title Insurance

- **AOLs and title insurance are similar products, but they have historically diverged with regard to coverage of defects that cannot be ascertained by simply reviewing the land records, and with respect to the protection of successors-in-interest to the property. However, in recent years, alternative products have emerged that are modeled after traditional AOLs, but also include certain enhanced coverage features.**

AOLs and title insurance are designed to address similar risks—at their essence, they are both an opinion as to the history and current status of title to real property and an assurance to stand behind that opinion and honor losses resulting from errors in the opinion. Where these two products have historically diverged is with respect to coverage of defects of title that cannot be ascertained by simply reviewing the land records, such as unrecorded or misindexed liens or judgments, and fraud or forgery.

Because the protections and limitations of traditional AOLs can be as varied as the entities that are offering them, they are not easily compared across providers. However, AOLs generally offer fairly limited assurances, such as identifying the vested owner of the property, providing information regarding unpaid taxes and existing liens, encumbrances and defects appearing against the property, addressing the marketability of title, and outlining the steps to be taken to transfer clear title. AOLs have not traditionally protected against losses resulting from (i) defects caused by forgery, fraud, undue influence, duress, incapacity, or impersonation; (ii) lack of authority in connection with a transfer or conveyance; (iii) documents that are not properly authorized, executed, acknowledged, witnessed, sealed, or notarized; (iv) defective judicial or administrative proceedings; (v) documents not properly filed, indexed, or recorded in the public records; (vi) the invalidity or unenforceability of the lien of the mortgage or deed of trust upon title; (vii) encumbrances, violations, boundary line issues, or encroachments that would be revealed by a survey; or (viii) violations of covenants, conditions and restrictions of condominiums and planned unit developments. Most of the foregoing would generally be covered under the American Land Title Association (“ALTA”) title insurance policies, subject to specific exclusions and exceptions (some of which may be removed with endorsements).

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<sup>13</sup> Attorneys once challenged the authority of title insurers, arguing that issuing insurance was akin to the rendering of a title opinion and, thus, the unauthorized practice of law. See *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977).

<sup>14</sup> See Braunstein and Genn at 474.

Traditional AOLs and title insurance policies also vary markedly with respect to ability of the beneficiary (or their successor) to file claims related to covered issues and the obligations of the preparer/issuer to defend and indemnify the beneficiary for their losses. In the event of a loss due to an alleged error by the preparer of a traditional AOL, the beneficiary would generally need to establish negligence on the part of the preparer in order to recover damages resulting from the loss (whether from the preparer or their E&O insurer). As a practical matter, this means that the beneficiary of an AOL may need to bear the costs associated with resolving the title issue themselves while also weighing whether to incur the costs of a negligence claim against the preparer. By contrast, the beneficiary of a title insurance policy can trigger the title company's duty to indemnify and defend the insured from losses arising as a result of a covered issue by simply filing a claim with the title insurance company. Although the title company may take the position that no "loss" has yet occurred (depending on the nature of the issue), the threshold for (and expenses associated with) establishing a loss sufficient to trigger the duty to defend and indemnify is much lower than that which is needed to establish malpractice on the part of the preparer.

Additionally, traditional AOLs are also generally written for the benefit of the named beneficiary only and are often not transferrable to a successor in interest, while a lender's policy covers future purchasers of the obligations secured by the insured mortgage. Finally, the beneficiary of a traditional AOL may find their malpractice claim time-barred in states where the statute of limitations runs from the date of issuance of the AOL (rather than the date of discovery of the issue) or could find that the law firm that issued the AOL no longer exists, is insolvent, or may have a lapsed E&O policy.<sup>15</sup> By comparison, a claim under a title insurance policy would generally not be time barred except where the delay was caused by the insured, and although title insurance companies are not immune from insolvency, reserve requirements imposed on title insurance companies helps mitigate the risk associated with a possible failure.

In recent years, alternatives to title insurance have emerged that are modeled after traditional AOLs, but which also incorporate additional coverage to address some of the aforementioned deficiencies of traditional AOLs. One method of enhancing the coverage afforded by a traditional AOL involves offering an AOL with a "wrapper" backed by an errors and omissions policy, an approach that has received significant attention in the past year.

#### **IV. Title Insurance Alternatives as a Way to Reduce Barriers to Homeownership**

- **The GSEs have been seeking ways to reduce barriers to homeownership for low-income individuals by cutting closing costs. Title insurance is often one of the largest closing costs paid by a homeowner, and Fannie Mae and Freddie Mac have both announced their willingness to accept AOLs in lieu of title insurance, provided certain conditions are met. However, the rollout of these programs has been limited thus far.**

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<sup>15</sup> For example, in Kentucky, where AOLs are common in some areas, the statute of limitations for a professional malpractice claim is one year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. KY. REV. STAT. ANN. § 413.245.

Title insurance alternatives have caught the attention of the GSEs, which have signaled that they are focused on reducing closing costs and other related barriers to homeownership for low-income individuals.<sup>16</sup>

In its June 2022 Equitable Housing Finance Plan, Freddie Mac noted that the title insurance policy premium is typically the largest closing cost incurred by borrowers, and most consumers do not shop for lower rates, even when they are available.<sup>17</sup> The cost of title insurance relative to the amount of claims actually paid by title insurance companies has also led critics of title insurance to question its value. According to ALTA, title insurers were paid \$17.6 billion in premiums during the first nine months of 2022, and paid \$438.7 million in claims during the same period.<sup>18</sup> The incidence of complete failure of title is rare, with refinances presenting less risk given that most title issues are resolved when a property is purchased and it is less likely that title issues would come to light between a purchase and subsequent refinance.<sup>19</sup> Also, to the extent that any new issues arise post policy, they would typically not be covered by the title insurance policy.<sup>20</sup>

Fannie Mae also made comments regarding title insurance alternatives in its 2022 Equitable Housing Finance Plan, where it indicated plans to update its *Selling Guide* to encourage lenders to allow borrowers the option of utilizing AOLs in lieu of traditional title insurance in order to reduce closing costs.<sup>21</sup>

On April 6, 2022, Fannie Mae followed through on this goal by announcing that it would permit lenders to use AOLs in lieu of traditional title insurance policies, provided that certain conditions are met and required language is included.<sup>22</sup> Freddie Mac began accepting AOLs in lieu of title insurance effective September 1, 2022, with similar conditions to Fannie Mae.<sup>23</sup>

The practical impact of these changes to the AOL program has been minimal. In Fannie Mae's 2022 Equitable Housing Finance Plan Performance Report, Fannie Mae noted that they began accepting loan deliveries with attorney opinions in the final quarter of 2022, and only accepted delivery of forty-five (45) such loans in 2022, with these consumers saving an estimated average of \$1,034 each as a result.<sup>24</sup> For context, Fannie Mae's 2022 year-end financial report disclosed total purchases of 1,151,000 single-family

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<sup>16</sup> See *Freddie Mac Equitable Housing Finance Plan*, June 2022; *Fannie Mae Equitable Housing Finance Plan*, 2022; Nuno Mota and Mark Palim, *Barriers to Entry: Closing Costs for First-Time and Low-Income Homebuyers*, FANNIE MAE (Dec. 2021), <https://www.fanniemae.com/media/document/pdf/barriers-entry-homebuyer-closing-costs>.

<sup>17</sup> *Freddie Mac Equitable Housing Finance Plan*, June 2022, Section 4.3: Single-Family Title Insurance Cost Reduction, p. 23.

<sup>18</sup> Brooklee Han, *Fannie Mae Rumored to be Looking at Forgoing Title Insurance*, HOUSINGWIRE (Mar. 9, 2023), <https://www.housingwire.com/articles/fannie-mae-rumored-to-be-looking-at-forgoing-title-insurance>.

<sup>19</sup> *Id.*

<sup>20</sup> Exclusion 3(d) of the 2021 ALTA Loan Policy of Title Insurance states that the Company will not cover "any defect, lien, encumbrance, adverse claim, or other matter...attaching or created subsequent to the Date of Policy." American Land Title Association Loan Policy of Title Insurance, 2021 v. 01.100, July 1, 2021.

<sup>21</sup> *Fannie Mae Equitable Housing Finance Plan*, 2022, p. 27.

<sup>22</sup> *Fannie Mae Selling Guide* Announcement (SEL-2022-03), Apr. 6, 2022.

<sup>23</sup> *Freddie Mac Selling Guide*, Opinions of Title (certificates of title), Section 4702.3.

<sup>24</sup> *Fannie Mae's 2022 Equitable Housing Finance Plan Performance Report*, April 2023, pgs. 12-13.

purchase loans and 886,000 single-family refinance loans in 2022.<sup>25</sup> Given the laudable goal of removing barriers to home ownership and the reported savings from utilization of AOLs, one might have expected a more robust initial rollout, but the attorney title opinion requirements imposed by both Fannie Mae and Freddie Mac have limited the efficacy and impact of these policy changes.

In March 2023, rumors began circulating that Fannie Mae intended to take its increased flexibility towards title insurance a step further in order to further the goals of its Equitable Housing Finance Plan. *PoliticoPro* reported that the GSE would be launching a pilot program where it would grant waivers on title insurance requirements in connection with certain loans it purchases.<sup>26</sup> However, on August 14, 2023, *HousingWire* reported that Fannie Mae has opted not to move forward with the pilot program.<sup>27</sup>

## V. GSE Requirements and Limitations on AOLs

- **Both the Fannie Mae and Freddie Mac Selling Guides contain various restrictions on their acceptance of AOLs, including limitations on the types of loans and properties that are eligible for AOLs. AOLs must also be a “commonly acceptable” alternative to title insurance in the given region, which significantly limits the ability to scale utilization of AOLs.**

Although Fannie Mae and Freddie Mac have expressed the desire to save homeowners money through their acceptance of AOL products, their respective Selling Guides contain many restrictions that render AOLs acceptable only in certain circumstances. Among the most limiting of these conditions is the requirement that the attorney opinion of title must be “commonly acceptable in lieu of title insurance by private institutional mortgage investors in the area where the subject property is located.”<sup>28</sup> Given the absence of any guidance regarding the standard to be applied in determining whether AOLs are viewed by private institutional investors as a “commonly acceptable” substitute for title insurance in any given region or state, a strict reading of this requirement could limit Fannie and Freddie’s purchase of AOL-backed paper to a small handful of states and regions (such as Ohio, Kentucky, and upstate New York) before consideration of the other requirements that must be satisfied for eligibility. The GSE representatives we spoke with declined to go on record, but given that there has been no additional guidance regarding how the GSEs are interpreting these requirements, we assume that they are interpreted as narrowly as they are written.

In addition to the above geographic limitation, Fannie Mae and Freddie Mac guidelines do not permit AOLs to be used in connection with loans secured by condominium units, cooperative share properties,

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<sup>25</sup> *Fannie Mae Reports Net Income of \$12.9 Billion for 2022 and \$1.4 Billion for Fourth Quarter 2022*, Fannie Mae Fourth Quarter and Full Year 2022 Results, February 14, 2023.

<sup>26</sup> Katy O’Donnell, *Fannie Moves to Revamp Title Insurance Despite GOP Warnings of Risk*, POLITICOPRO (Mar. 1, 2023), <https://subscriber.politicopro.com/article/2023/03/fannie-moves-to-revamp-title-insurance-despite-gop-warnings-of-risk-00085030>.

<sup>27</sup> Brooklee Han, *Fannie Mae Scraps Title Waiver Pilot Program*, HousingWire (Aug. 14, 2023), <https://www.housingwire.com/articles/fannie-mae-scraps-title-waiver-pilot-program/>.

<sup>28</sup> *Fannie Mae Selling Guide* B7-2-06, Attorney Title Opinion Letter Requirements (04/06/2022); see also *Freddie Mac Selling Guide*, Opinions of Title (certificates of title), Section 4702.3.

dwellings on leasehold estates, manufactured homes, and properties subject to restrictive agreements and covenants. AOLs are also not permitted to be used for Texas Section 50(a)(6) loans, community land trust mortgages, loans executed using a power of attorney, or HomeStyle Energy and HomeStyle Renovation Loans.<sup>29</sup> These criteria suggest that the GSEs consider these property and loan types to carry added risk for lenders from a title perspective.

Skeptics of Fannie and Freddie's policies regarding AOLs have noted that if all of these requirements and restrictions were strictly adhered to, the majority of loans to low-income consumers would not be eligible to be insured by an AOL, which is clearly at odds with the stated purpose of this program. The exclusion of manufactured homes, condominium units and cooperatives may be driven by practical challenges and concerns regarding perfection of the security instrument, but the effect of these exclusions is disproportionately borne by people of limited means. The requirement that the property not be subject to any restrictive agreements or covenants was also particularly concerning to many of the industry participants we interviewed, who noted that these types of restrictions are common throughout the United States.

Aside from these geographic limitations and restrictions on property and loan types, the Freddie Mac and Fannie Mae Selling Guides impose a number of additional requirements regarding the content of AOLs, which may make attorneys who would generally be willing to issue an AOL on an eligible property unwilling or unable to do so. These include (for all loans) providing a specific statement regarding the attorney's obligation to indemnify the seller and the seller's successor in interest to the full extent of all losses attributable to the attorney's failure to exercise reasonable care and skill in examining the title and giving the opinion. Providers of AOLs are also required to include specific language (similar to that found in ALTA Endorsement 8.1) regarding the absence of environmental protection liens as of the date of the opinion and the absence of state statutes (other than those specifically identified) that would allow any such lien in the future to take priority over the lien of the mortgage. AOLs that take exception to survey matters will also not be accepted.

Additional content requirements may apply depending on the character of the loan or the property. For transactions involving adjustable rate mortgages, the attorney is required to add language to the effect that state law provides that a) changes in the interest rate calculated pursuant to the formula provided for in the mortgage will not render the mortgage unenforceable or invalid and b) the priority of the lien of the mortgage for the unpaid principal balance of the loan, together with interest and other sums advanced by the noteholder, will not be lost as a result of changes in the rate of interest calculated pursuant to the formula provided for in the mortgage. For mortgages that are secured by units in a planned unit development, the AOL must state that there is no violation of any restrictive covenants that would restrict the use of the land or lead to the forfeiture of title, that all dues are current and not delinquent, that no recorded right of first refusal to purchase the land was or could have been exercised

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<sup>29</sup> *Id.*

on or before closing, and that the attorney is not aware of the existence or the exercise of a right of first refusal prior to closing.

If all of these requirements and limitations related to acceptance of AOLs appear at odds with Fannie and Freddie's new plans for reducing barriers to homeownership for low-income individuals, that is because these requirements, unlike the plans, are not new. Rather, these requirements relating to acceptance of AOLs can be traced back to earlier iterations of Freddie Mac's Single-Family Seller/Servicer Guide, which have historically contained many (but not all) of the above requirements.<sup>30</sup> It is unclear why some of these limitations were not removed or narrowed given the ambitious goals of the Equitable Housing Finance Plans, but one of the industry participants that we spoke with indicated that there may currently be an effort at FHFA to update these criteria so that AOLs can be accepted in a broader range of situations. Although Fannie and Freddie may allow exceptions to these requirements on a case-by-case basis, the current restrictions on utilization of AOLs in connection with Fannie and Freddie paper could prevent them from being scaled nationwide.

## VI. Voxtur AOL

- **Voxtur Analytics Corp. ("Voxtur") offers an enhanced AOL product called Voxtur AOL, which it markets as a full-coverage alternative to title insurance. Voxtur representatives were willing to speak with us regarding this product and provided a significant amount of information and materials for us to review. For this reason, we focused on the Voxtur AOL in our comparison of AOLs to traditional title insurance.**

Immediately following Fannie Mae's announcement that it would begin accepting AOLs, Voxtur announced that it offers a fully compliant alternative to traditional title insurance through its "Voxtur AOL," which it is marketing as a full-coverage title insurance alternative.<sup>31</sup> Voxtur CEO Jim Albertelli noted that "Fannie Mae has identified closing costs as a barrier to homeownership," and Voxtur "directly reduces those costs, maybe opening the door to homeownership a little wider for more Americans."<sup>32</sup>

On October 17, 2022, Voxtur announced that the Voxtur AOL is available in connection with loans made or backed by the Department of Veterans Affairs (the "VA").<sup>33</sup> This announcement was made in response to an update to the VA Lenders Handbook, effective September 29, 2022, which included revisions to the

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<sup>30</sup> See e.g. Freddie Mac's Single-Family Seller/Servicer Guide, Volume 1, Chapter 39.3 (7/31/94)(containing similar requirement regarding AOLs being commonly acceptable in lieu of title insurance by investors in the area, prohibiting AOLs related to mortgages on condominium, PUD, or dwelling on a leasehold estate, prohibiting survey exceptions, and requiring the statement regarding the attorney's obligation to indemnify, but not otherwise including the other restrictions addressed above and actually providing a detailed list of acceptable exceptions (under certain conditions) to AOLs including restrictive agreements, encroachments and mutual easements.

<sup>31</sup> *Voxtur to Provide Attorney Opinion Letters on Fannie Mae Loans*, GLOBENEWSWIRE (Apr. 7, 2022), <https://www.voxtur.com/voxtur-to-provide-alternative-to-title-insurance-on-fannie-mae-loans>.

<sup>32</sup> *Id.*

<sup>33</sup> *Voxtur to Provide Attorney Opinion Letters on VA Home Loans*, GLOBENEWSWIRE (Oct. 17, 2022), <https://www.voxtur.com/voxtur-to-provide-attorney-opinion-letters-on-va-home-loans>.

provisions of the Handbook regarding title insurance to specifically reference AOLs.<sup>34</sup> The VA did not previously require title insurance, instead allowing lenders to impose their own title insurance requirements on VA-backed loans, and the Handbook now notes that AOLs are also not required.<sup>35</sup>

Voxtur has positioned itself as perhaps the most visible of the entities currently offering an alternative to traditional title insurance. Voxtur representatives were willing to speak with us in detail regarding the Voxtur AOL and shared a significant amount of information and materials regarding this product. Although Voxtur is not alone in offering these alternative products, given our access to this information and materials, we focused on the Voxtur AOL in our comparison of AOLs to traditional title insurance.

## VII. United Wholesale Mortgage TRAC Program

- **United Wholesale Mortgage’s TRAC (“UWM TRAC”) is a similar product to Voxtur AOL in that it is intended to serve as an alternative to title insurance and involves an attorney opinion of title. However, it is offered by UWM for the benefit of holders of UWM paper only, and is not offered to borrowers, who must obtain separate coverage. Essentially, UWM self-insures its loans.**

In October 2022, United Wholesale Mortgage (“UWM”) announced its Title Review and Closing Program, or “TRAC.” Much like Voxtur’s AOL, TRAC is designed to serve as an alternative to title insurance and also involves an attorney opinion letter.<sup>36</sup> TRAC is not available for loans secured by co-ops, manufactured homes, or PUD properties, or in connection with Texas 50(a)(6) loans, HELOCs, government loans or non-agency loans.<sup>37</sup>

To obtain coverage through TRAC, the borrower can choose one of UWM’s designated closing agents to close the loan for a flat rate of \$350, and the title coverage costs 20 basis points for a refinance and 30 basis points for a purchase.<sup>38</sup> The closing agent also issues a “Closing Indemnification Letter” to cover any losses arising from the closing of the loan.<sup>39</sup> One limitation on TRAC coverage is that it is offered for lenders only, and borrowers must obtain separate coverage. However, as UWM notes, in many states, owner’s coverage is paid for by the seller in a purchase transaction.<sup>40</sup>

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<sup>34</sup> VA Pamphlet 26-7, Chapter 9, Page 9-5, Oct.12, 2022.

<sup>35</sup> *Id.* “VA does not require a lender making a VA loan or the Veteran-borrower to obtain title insurance or, where appropriate for the jurisdiction, an Attorney Opinion Letter. The lender may apply its own title insurance requirements to VA loan transactions.”

<sup>36</sup> *Use TRAC to Give Borrowers Big Savings at Closing*, UNITED WHOLESALE MORTGAGE (last visited July 24, 2023), <https://www.uwm.com/manage-your-pipeline/pipeline-tools/trac>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The Seller is responsible for purchasing Owner’s title insurance coverage in the following states: Washington; Oregon; Idaho; Montana; Wyoming; Nevada; Utah; Colorado; Arizona; New Mexico; Alaska; Texas; Arkansas; Illinois; Indiana; Wisconsin; Michigan; and Florida. Steve Gottheim, *Unregulated Title Alternatives Update* (American Land Title Association Presentation to National Association of Insurance Companies Title Insurance Task Force, 2023), [https://content.naic.org/sites/default/files/national\\_meeting/Title%20Insurance%20Task%20Force%20Materials%201\\_0.pdf](https://content.naic.org/sites/default/files/national_meeting/Title%20Insurance%20Task%20Force%20Materials%201_0.pdf).

The TRAC attorney opinion letter contains instructions for holders of UWM paper to contact UWM in the event of a title issue, and UWM will pursue certain options to resolve the issue, such as remedying the title issue or repurchasing the loan.<sup>41</sup> Accordingly, UWM essentially self-insures the loan.

## VIII. Criticisms of Alternative Title Insurance Products

- **Enhanced AOL products have received criticism for offering less protection to lenders and consumers, and some critics have implied that providers of enhanced AOL products are essentially operating as unregulated title insurers. State regulators have yet to publicly weigh in on these claims and they may do so in the future, but it is unlikely that they would invalidate existing AOLs or underlying E&O policies, as doing so would leave consumers unprotected.**

The American Land Title Association (“ALTA”) is a trade association for the title insurance industry, which sets standards and best practices for the industry. Through correspondence dated September 6, 2022, ALTA raised concerns to the Federal Housing Finance Agency (“FHFA”) about the acceptance of AOLs by the GSEs. This correspondence was supported by an extensive comparison of AOLs and traditional title insurance policies, which was prepared by the law firm of Greenberg Traurig at ALTA’s request. The comparison revealed several alleged areas of coverage that are afforded by traditional title insurance, but not AOLs with “liability wraps” as offered by Votxur. Votxur responded to this comparison by taking the position that because its product had since been updated to address many of these gaps, the comparison was not an accurate reflection of the coverage currently afforded by their product.<sup>42</sup>

Another criticism that is often raised regarding enhanced AOL products is the general concern that they purport to afford many of the same benefits of title insurance, yet proponents of these products claim that they are not insurance and therefore need not be regulated by state insurance regulators. A specific concern associated with the lack of regulation of alternative title insurance products is the fact that state insurance regulation statutes typically require title insurers to maintain reserve funds,<sup>43</sup> and the lack of any such reserves could ultimately cause significant harm to lenders and borrowers in the event of an unanticipated surge in claims.

However, it is Votxur’s position that the product is sufficiently regulated, as the individual attorneys are regulated by their respective state bars, and the issuer of Votxur’s E&O policy is regulated by each state insurance regulator.<sup>44</sup> Critics of alternative title insurance products believe that state insurance regulators will not be satisfied with this argument, particularly the Texas Department of Insurance, which has a large department charged with enforcement of Texas’ title insurance regulations. That said, a state regulator

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<sup>41</sup> See Gottheim.

<sup>42</sup> Votxur also noted that the comparison was prepared based on a title insurance policy where every possible endorsement is purchased, which would inevitably result in superior coverage but would also be a costly and impractical approach to purchasing title insurance.

<sup>43</sup> See Sterk, *supra* note 11, at 542, citing, *e.g.*, CAL. INS. CODE § 12382.2; N.Y. INS. LAW 6405; FLA. STAT. § 625.111 (2020); 40 PA. STAT. § 910-15.

<sup>44</sup> Stacy Mestayer, *Votxur AOL: Full-Coverage Title Insurance Alternative*, (Presentation to National Association of Insurance Commissioners Title Insurance Task Force, 2022).

has yet to weigh in on this debate. Although many state regulators are likely closely monitoring the introduction of these new products into their markets, we suspect that regulators will need a test case involving an actual AOL in order to take any meaningful action with respect to these products.

Although it is not clear whether any state insurance regulators will conclude that these enhanced AOL products should be regulated as a form of insurance, past events give some indication of the impact of such a determination. For example, in 2002, the Commissioner of the California Department of Insurance issued a cease-and-desist order in response to Radian Guaranty's Lien Production policy, which was intended to protect lenders from losses caused by undisclosed liens. The Commissioner characterized the Radian Lien Protection policy as unlicensed "marketing, soliciting and selling" of "insurance policies that provide coverage for undisclosed property liens" that did not "measure up to true title insurance."<sup>45</sup> The Commissioner also issued a Notice of Right to Hearing and a Notice of Fine, which imposed a fine of up to \$5,000 per day if the order was violated. After exhausting its administrative remedies to challenge the Commissioner's order, Radian filed a petition for a writ of administrative mandamus with the San Francisco Superior Court on the grounds that the cease-and-desist order was based on a misinterpretation of the coverage provided by the product and the statutes governing mortgage guaranty insurers like Radian.<sup>46</sup> The Superior Court ultimately denied Radian's request, and the denial was upheld by the Court of Appeal, which held that the cease-and-desist order was appropriate and should be permanently enforced.<sup>47</sup>

It is not outside the realm of possibility that a regulator could impose similar sanctions in connection with certain enhanced AOL products. However, we do not believe a state regulator would go as far as invalidating existing AOLs or underlying E&O policies, as this would only serve to harm the consumers and lenders who relied on these products.

## **IX. Comparison of Voxtur AOL to Traditional Title Insurance**

Questions remain regarding whether enhanced AOL products are a viable alternative to title insurance given that much remains unknown about how these products operate in practice. As noted above, Voxtur suggests that the coverage provided under its AOL extends beyond traditional AOLs and is more comparable to the coverage provided by title insurance. In order to evaluate these claims, we were provided with a representative sample of a complete AOL (with exhibits), a supporting E&O policy, a Master Services Agreement and Statement of Work between Voxtur and a lender utilizing their AOL services, and other related documents and materials.

Following our initial analysis of these documents, we exchanged multiple correspondence and participated in several conferences with Voxtur representatives to address certain questions and concerns we had regarding the scope of coverage and treatment of claims under their AOL and the E&O policy,

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<sup>45</sup> *Radian Suffers Blow to Its Lien Protection Product*, ALTA (June 20, 2002), <https://www.alta.org/news/news.cfm?20020620-Radian-Suffers-Blow-to-Its-Lien-Protection-Product>.

<sup>46</sup> *Radian Guaranty, Inc. v. Garamendi*, 26 Cal. Rptr. 3d 464 (Ct. App. 2005).

<sup>47</sup> *Id.*

based on our interpretation of these documents. After these discussions, Voxtur went back to their E&O insurer and the AOL firms they utilize to request specific changes to address some of our comments, and subsequently provided us with updated versions of the AOL and the E&O policy, which have been approved for use going forward. This comparison is based on the most recent iterations of these documents.<sup>48</sup>

Although we believe the Voxtur AOL does bridge some of the gaps that exist between traditional AOLs and title insurance policies, differences between the Voxtur AOL and ALTA Title Insurance policies still exist (and are inevitable), both with regard to the scope of coverage and the claims process. These gaps are due in part to inherent limitations on what attorneys are able to opine on based on their review of the public records and the nature of the relationship between the attorney providing the opinion and their E&O insurer, on the one hand, and the individual or entity relying on the AOL, on the other. Our comparison of the Voxtur AOL to traditional title insurance follows.

#### **A. Comparison of Scope of Coverage**

- **The Voxtur AOL assures that title to the property is “marketable” and subject only to the Subject Mortgage. Like other AOLs, the Voxtur AOL also contains separate sections setting forth certain Assumptions and Exceptions, which further impact the scope of coverage provided. It is unclear what would be required to remove some of the Exceptions, as Endorsements cannot be added for this purpose as they can be added to a traditional title insurance policy. The scope of coverage is further limited by certain Qualifications in the Voxtur AOL.**

With regard to scope of coverage, the Voxtur AOL provides an opinion of the issuing firm as of the Opinion Effective Date,<sup>49</sup> which is solely based on the examination and review of the “Title Records” that the firm located in the “Public Records,”<sup>50</sup> regarding (i) Title Vesting and Marketability and (ii) Lien Priority. The section of the opinion related to Title Vesting and Marketability provides the following assurances: (i) title is vested as set forth in Exhibit A (as described in Exhibits A and A-1)<sup>51</sup> and is subject to the liens and

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<sup>48</sup> As discussed in more detail below, it is our understanding that the carrier of Voxtur’s E&O policy is in the process of making certain additional revisions to language in the E&O policy to expressly include Voxtur’s contracted law firms and their attorneys within the definition of “Insured” under the policy. However, although it is our understanding that these changes have been approved by the carrier, we have not seen the final changes to the policy.

<sup>49</sup> The later of: (i) the date of the Voxtur AOL or (ii) the effective date of the real property security instrument that is executed as part of the AOL transaction (the “Subject Mortgage”).

<sup>50</sup> The Background section of the Voxtur AOL makes it clear that the firm’s review of “Public Records” was limited to the recording or filing system established under the laws of the state where the property is located, under which documents must be filed or recorded to impart constructive notice to purchasers for value without actual knowledge, and does not include any other filing or recording system such as those related to “environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters. This definition of “Public Records” is substantially similar to that found in ALTA policies of title insurance. “Title Records” is just that subset of “Public Records” that the issuing firm identified as pertinent to title and the AOL.

<sup>51</sup> This vesting information includes identification of the current purchaser/borrower in title, identification of the vesting deed into that purchaser/borrower, identification of the nature of their ownership interest in the property, identification of the holder of the mortgage/deed of trust encumbering the property and the instrument to be recorded to perfect their interest, and the property’s legal description.

encumbrances described in the AOL; (ii) the Title is Marketable Title subject only to the Subject Mortgage and any exceptions and encumbrances described in the AOL; and (iii) the holder of Title as identified in Exhibit A has a right of legal access to and from the Property. The term “Marketable Title” is defined as “record title that is free from reasonable doubt such that a prudent person, with actual knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it.” The Voxtur AOL further clarifies this definition by noting that Marketable Title does not require that the property be free from every possibility of a defect; rather, Marketable Title is title that is not impacted by an apparent or alleged issue or defect such that a purchaser, lessee, or lender would be released from their obligation to consummate their transaction if the transaction in question was conditioned on title to the property being Marketable Title.

The section of the AOL addressing Lien Priority provides the following assurances: (i) the lien of the Subject Mortgage is a valid and enforceable lien on Title and enjoys priority over other liens except as set forth in the AOL; (ii) the lien of the Subject Mortgage as security for loan advances has priority over statutory construction liens for labor, services, equipment or materials when such construction is (a) contracted for or commenced before the Effective Date, or (b) contracted for, commenced or continued after the Effective Date if the labor, services, equipment or materials is financed in part by the proceeds of the loan secured by the Subject Mortgage that the lender has advanced or is obligated to advance as of the Effective Date; and (iii) the lien of the Subject Mortgage has priority over any lien of assessments for street improvements completed or under construction.

Like other AOLs, the Voxtur AOL also contains separate sections setting forth certain Assumptions and Exceptions, which further impact the scope of coverage provided. With regard to the Assumptions, the firm issuing the AOL notes that (i) it has assumed without verification or investigation that all Title Records reviewed as originals are authentic and all of those viewed as copies conform to the originals, which themselves are authentic; (ii) each statement contained in the Title Records regarding a factual matter that is not known to the issuing firm to be untruthful is truthful; (iii) the Title Records are complete and authentic; and (iv) there are no provisions in any documents beyond those reviewed by the issuing firm that are inconsistent with the opinion. Absent from this list are assumptions regarding (i) the signatures on the Title Records being genuine and valid; and (ii) the Title Records being valid and binding obligations of the parties thereto. These missing assumptions are fairly common in traditional AOLs, and were in the initial Voxtur AOL that we reviewed, but it is our understanding that they were removed from the Voxtur AOL template following our discussions regarding the scope of coverage. It is believed that this change was made in an effort to provide limited coverage in some of the areas that are not covered by traditional AOLs but are generally covered by title insurance.<sup>52</sup> Although the absence of these two assumptions may remove some barriers to claims resulting from the attorney’s reliance on signatures and documents in the Title Records which contain inherent defects that a reasonably prudent attorney would have caught, the majority of future claims relating to fraud, forgery, authority or similar failures and defects in the chain of

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<sup>52</sup> Such as defects caused by forgery, fraud, or impersonation; lack of authority in connection with a transfer; documents that are not properly authorized, executed, acknowledged, witnessed, sealed, or notarized; or defective judicial or administrative proceedings.

title would not be readily ascertainable based on a review of the Title Records. Because the Voxtur AOL is based solely upon the issuing firm's review of Title Records, and is subject to the above Assumptions, we do not believe that these unknown (and arguably unknowable) defects would give rise to a viable claim under the Voxtur AOL, even to the extent they impacted title, marketability, or lien priority. With that said, protecting against unknowable risks is the province of title insurance, and not something that any AOL could reasonably purport to cover.

With regard to the Exceptions, the Voxtur AOL contains a number of exceptions that are consistent with the standard exclusions from coverage from an ALTA policy of title insurance,<sup>53</sup> some that are similar to the Standard Exceptions that would be listed on Schedule B Section II of an ALTA policy,<sup>54</sup> and others that exclude certain losses related to covenants, conditions and restrictions generally<sup>55</sup> in the way that is similar to how Schedule B Section II addresses such issues in connection with specific Declarations, plats, or other identified documents found in the public records. Although the Voxtur AOL Exceptions do appear to share much in common with ALTA exclusions and exceptions, a number of the standard ALTA exclusions and exceptions may be insured over through an Endorsement or deleted based upon an affidavit from the parties to the transaction, an investigation by the insurance company, or receipt of an accurate survey of the property.

Voxtur advised us that the survey exception will be removed when a survey is obtained and reviewed, and stated that they can adjust for other exceptions at the Lender's request. However, it is unclear what would be required to remove these other Exceptions, as there would be nothing akin to the Endorsements that may be purchased in connection with a title insurance policy that would enable an attorney to remove exceptions related to possible issues associated with violations of covenants, conditions and restrictions, environmental protection liens, or other specific issues that may be of concern to the beneficiary of the AOL. These Endorsements obviously come with additional cost, which will need to be weighed (along with the cost differential between the alternative products generally) and compared to these additional risks that might not be "insured" against under a Voxtur AOL, but the inability to remove many of these

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<sup>53</sup> These include excepting liability for losses relating to: defects and liens that are created, suffered, or assumed by the beneficiary; the enforcement or effect of laws, ordinances, permits, or regulations relating to use or enjoyment of the land, the character, dimensions, or location of improvements, subdivision of the land, and environmental remediation or protection (unless an enforcement notice is recorded in the Public Records); the exercise of rights of governmental forfeiture (unless an enforcement notice is recorded); invalidity of the mortgage due to violations of doing-business laws, usury, or consumer protection law; claims under bankruptcy, insolvency, or creditor's right law that the transaction is a fraudulent conveyance or transfer, voidable under the Uniform Voidable Transactions Act, or is a preferential transfer (if other conditions are satisfied).

<sup>54</sup> Examples include: the effect on the title of encumbrances, encroachments, violations, variations, and adverse circumstances that would be disclosed by an accurate and complete survey; rights, interests, or claims of tenants, lessees, or parties in possession of the Property that are not showing in the public record (and in the case of the Voxtur AOL, even if these rights or interests could be determined by an inspection of the Property or an inquiry of such parties); and a lien for services, labor, or materials furnished before or after the Effective Date imposed by law and not shown in the Public Records.

<sup>55</sup> Such as including an exception for covenants, conditions, restrictions, and other instruments in the public records that impose a fee in connection with a conveyance of an interest in the property and any related fees, liens, or charges (recorded or unrecorded) and other rights related thereto; and the enforcement of terms, conditions, easements, and rights established pursuant to any declaration, covenant, or restriction under state law, including those which allow associations to regulate assessments and impose liens (except to the extent specifically noticed and recorded in the public records).

Exceptions cuts against any claims that the coverage provided by these two alternative products (Voxtur and UWM's TRAC) is virtually indistinguishable.

Finally, the Voxtur AOL also contains a number of Qualifications, which are generally consistent with what one might expect from an AOL, but a few of which are worthy of mention here, insofar as they may impact the scope of coverage compared to traditional title insurance. These Qualifications include a statement to the effect that the firm's engagement was limited to searching and examining the Public Records and Title Records and providing the AOL, and that the firm expresses no opinion regarding the validity of any contract, the nature of any negotiations, the status of parties, the sufficiency of consideration or any other matters regarding the Property, the Title, or the Title Records. This language could be reasonably construed as disclaiming any responsibility for failing to identify the types of inherent defects in signatures and documents in the Title Records discussed above (even those that a reasonably prudent attorney should have caught). The Voxtur AOL also contains a Qualification which makes it clear that the AOL does not express an opinion (except as specifically set forth in the AOL) regarding the effect or application of environmental, land use, zoning, and other local laws, health and safety laws, and tax and criminal laws.

## ***B. Cost Comparison: Are Enhanced AOLs Really Less Expensive Than Title Insurance?***

- **Providers of enhanced AOL products claim that these products are more cost effective than traditional title insurance. Fannie Mae reports average consumer savings of \$1,034 in the 45 AOL loans they purchased in 2022. However, this small sample size is anecdotal, and it is difficult to estimate any potential savings in connection with a nationwide rollout. The wide divergence in the cost of title insurance across states also cuts against any sweeping claims of affordability of AOLs as a national alternative to title insurance.**

As noted above, the driving force behind the push by the GSEs to increase utilization of AOLs is the desire to significantly reduce closing costs in an effort to remove another barrier to homeownership. Fannie Mae reports average consumer savings of \$1,034 in the 45 AOL loans they purchased in 2022. However, this small sample size is anecdotal and not necessarily indicative of the savings that would result in a nationwide rollout of mortgages supported by AOLs. Providers of AOLs have consistently taken the position that AOLs are a more cost-effective option for borrowers, with Voxtur claiming that utilization of their AOL will allow homeowners to save 20-70 percent off the cost of traditional title insurance.<sup>56</sup>

One way Voxtur claims to have reduced costs is by minimizing the cost of the title work necessary to issue its AOL. With traditional title insurance, premiums are split between the title insurer and the agent to compensate both parties for their respective roles in the process.<sup>57</sup> Agents typically retain 60 to 90 percent of a title insurance premium, with the remainder paid to the underwriter.<sup>58</sup> Because agents do the

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<sup>56</sup> Jim Albertelli, *Here's Why Attorney Opinion Letters Are Set to Revolutionize Mortgage Lending*, VOXTUR (Oct.10, 2022), <https://www.voxtur.com/heres-why-attorney-opinion-letters-are-set-to-revolutionize-mortgage-lending>.

<sup>57</sup> Stewart E. Sterk, *Title Insurance: Protecting Property at What Price?*, 99 WASH. U. L. REV. 519, 532.

<sup>58</sup> *Id.* at 532-3, citing Peter Soskin, *Protecting Title in Continental Europe and the United States – Restriction of a Market*, 7 HASTINGS BUS. L.J. 411, 439-40 (2011) (estimating that agents receive between 85 and 90 percent of premiums paid); *Industry Fundamentals*, A.M. Best, <http://www.ambest.com/title/fundamentals.html> [<https://perma.cc/P6DF-VFTX>] (estimating that

majority of the work searching the land records to identify any title issues and retain much of the liability for errors associated with these efforts, they are compensated accordingly.<sup>59</sup>

Voxtur believes that this arrangement increases the cost of title insurance for consumers, and they have attempted to reduce this added cost by having their in-house title examiners conduct much of the title work on a given transaction before the file is given to an attorney to review. However, inevitably there are some costs associated with buying and analyzing data that simply cannot be avoided.

Skeptics of these claims have argued that Voxtur has not provided support for these alleged cost savings. They also note that the wide variation in pricing of title insurance between those states that promulgate rates or have rates set by insurance bureaus, those that employ a “file and use” system, and those that do not regulate rates, undercut any overarching claims regarding affordability. At one end of this spectrum is the State of Iowa, which substantially reduces the cost of title insurance for Iowa borrowers by providing title guarantees, closing protection letters, and other title-related services to homeowners through its state-sponsored Iowa Title Guaranty Program.<sup>60</sup>

The other extreme is a state like Texas, where the government sets the rate to be charged for title insurance, which results in the cost of title insurance being markedly higher than it would be if competition were allowed. As noted by the Texas Public Policy Foundation, the direct result of this restriction on competition in Texas is the creation of one of the most expensive markets for title insurance in the country, with the cost of insurance there bearing no reasonable relationship to the risk borne by the company issuing the policy.<sup>61</sup> This wide divergence in the pricing of title insurance throughout the country obviously undercuts broad claims of affordability of AOLs as a national alternative to title insurance, but it also reinforces the fact that in certain markets, an AOL may be considerably more affordable than a title policy.

Additionally, because the cost of title insurance is tied to the value of the property (with the cost of an owner’s and lender’s policy generally ranging from between .5 and 1.0 percent of the purchase price) while the cost of an AOL is generally fixed by the firm issuing the AOL and not directly tied to the value of the property (with a notable exception being the UWM product), the potential savings through utilization of an AOL may often be more pronounced in a larger transaction. Ironically, it is also in these transactions where the consumer is presumably better able to bear the cost of a traditional title insurance policy.

Although a comprehensive comparison of the cost of AOLs and title insurance by state is beyond the scope of this article, Voxtur’s materials indicate that it offers AOLs nationwide at a fixed fee of \$495 on refinance

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agents retain 60 to 90 percent); Thomas A. Hemphill, *The Title Insurance Industry; Infusing Innovation and Competition*, 54 BUS. ECON. 177, 178 (2019) (60-90 percent); Noel D. Uri, *The Title Insurance Industry: A Reexamination*, 17 REAL EST. L.J. 313, 330 (indicating agent retention from 75 to 90 percent).

<sup>59</sup> See Sterk, *supra* note 11, at 533.

<sup>60</sup> See Iowa Code § 16.91 et seq.

<sup>61</sup> See Bill Peacock, *Texas’ Title Insurance Tax: Texas One of the Most Expensive Title Insurance Markets in the U.S.*, TEXAS PUBLIC POLICY FOUNDATION (Jan. 2017), <https://www.texaspolicy.com/wp-content/uploads/2018/08/2016-12-PP31-TXTitleInsTax-CEF-BillPeacock.pdf>.

transaction and tiered rates of between \$695 and \$995 on purchase transactions. It should be noted that these rates are specific to the issuance of the AOL, and do not include related settlement costs, which some have argued may be higher than comparable settlement costs charged by providers of traditional title insurance.

In order to better understand the actual cost of a Voxtur AOL as compared to a title insurance policy, Voxtur provided us with a limited sample of Closing Disclosures on loans in seven states<sup>62</sup> for transactions where they had issued an AOL. Although several of these Closing Disclosures did include a closing fee that was slightly higher than one might obtain from an alternative provider, the majority of the settlement charges were in line with market rates and the overall savings (in this admittedly limited sample of closings) was significant.

### **C. Comparison of Claims Process**

- **Voxtur claims that its Voxtur AOL differs significantly from traditional AOLs with respect to the treatment of claims. These distinctions include claims that coverage extends to successors in interest of the original beneficiaries, that these beneficiaries can file claims directly with the E&O insurer without first foreclosing or establishing negligence of the attorney, and that the E&O insurer has a duty to defend the beneficiary in litigation involving a covered issue. We found these claims to be generally accurate; however, we identified Voxtur AOL's \$50,000 cap on "Claim Expenses" per "Incident" to be a potential risk for borrowers and lenders to consider when purchasing a Voxtur AOL.**

The Voxtur AOL purports to differ significantly from traditional AOLs with regard to the treatment of claims. These distinctions include claims that coverage extends to successors in interest of the original beneficiaries, that these beneficiaries can file claims directly with the E&O insurer without first foreclosing or establishing negligence of the attorney, and that the E&O insurer has a duty to defend the beneficiary in litigation involving a covered issue. Our analysis of these claims follows.

With regard to the beneficiaries of the Voxtur AOL, the sample we reviewed was written for the benefit of a defined Borrower and Lender, but it also contained a paragraph in its "Qualifications" section where the issuing firm expressly agreed to indemnify the named Lender and Borrower, and their successors in interest, to the full extent of any loss attributable to any breach by the firm of their duty to exercise reasonable skill and care in examining title and giving the opinion, while reiterating that it may not be used by any other party or for any other purpose. Significantly, this paragraph also contains specific definitions of "successor in interest" as to both the Borrower and the Lender, which are consistent with the treatment of successors to the Insured under the 2021 ALTA Owner's and Lender's policies.

These Qualifications also include a paragraph to the effect that the services performed by the firm (including the issuance of the AOL) are covered by a certain E&O policy that is described in Exhibit C to the Voxtur AOL. This Exhibit provides a certification that the loan identified in the Exhibit is covered by

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<sup>62</sup> California, Colorado, Florida, New Jersey, Pennsylvania, Tennessee and Texas.

the policy identified therein, sets forth loan level information, provides the E&O Policy Number and an AOL number, specifically identifies Voxtur (and not the law firm) as the named insured and the Lender as a named third-party beneficiary, and includes contact info for filing a claim. It also contains a notice to the effect that coverage referenced by the certificate is transferable and that the beneficiary or their transferee may file a claim by contacting the insurance company. This certificate does not specifically identify the Borrower as a named third-party beneficiary. During our discussions regarding the process for inclusion of the Borrowers under the policy, Voxtur stated that they provide their insurer with a list of all loans closed each month and the borrower information, and that those loans and borrowers are thereafter covered under the E&O policy.

The complete version of the representative E&O policy that we reviewed included a Service Agreement Endorsement which also identified a specific lender as a third-party beneficiary under the policy, and included within the definition of "Claimant," the third-party beneficiary, Mortgagors<sup>63</sup> and successors in interest to the Mortgage Agreement. This E&O policy also initially contained a definition of "Insured" that included Voxtur, subsidiaries, and affiliates of the Insured who are involved in providing Mortgage Origination Services (which includes AOLs provided pursuant to Service Agreements), and directors, officers, and employees of the Insured. It is our understanding that the E&O policy has now been updated to specifically include "Mortgagors" within the definition of "Insured," but the third-party beneficiary (the Lender) is not currently included with this definition. Additionally, it was not clear, based on our review of the materials provided, how this definition of "Insured" would necessarily extend to the law firms that are issuing AOLs, unless they are found to be "employees" or "affiliates" of Voxtur.<sup>64</sup>

Regarding the treatment of Claims, the coverage portion of the E&O policy purports to obligate the insurer to "pay on behalf of the Insured all sums incurred by the Insured in Damages to Claimants<sup>65</sup> as a result of an Incident... occur[ring] during the Policy Period." The term "Incident" covers errors, actions, breaches of contract, breaches of duty, etc. by the Insured in performing or failing to perform Mortgage Origination Services. Although the broad definition of "Claimants" under the E&O policy may have been intended to allow direct claims by covered borrowers and lenders, the above coverage language could be read as requiring the Insured to suffer Damages from other Claimants before the insurer is obligated to make a payment in connection with a Claim (subject to other conditions of the policy).

It is not clear whether the insurance company would apply this strict reading in deciding whether to pay a Claim, but it should be noted that other sections of the E&O policy contain requirements for submitting and substantiating Claims, acknowledge that a Claim does not require filing a lawsuit, and allow the

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<sup>63</sup> The E&O policy does not appear to expressly cover successors in interest of the Mortgagor.

<sup>64</sup> The E&O policy does contain a definition of "Employed Lawyer," which can include an independent contractor (if certain other conditions are satisfied), but which we interpreted as too narrow (given these identified conditions) to necessarily include independent law firms. We raised these issues with Voxtur on our most recent call with them and it is our understanding the carrier of their E&O policy has approved changing the defined term "Employed Lawyer" to "Contracted Law Firm or Lawyer," and has also approved changes to the definition of "Insured" to expressly include "any contracted Law Firm or Lawyer" of Voxtur. Voxtur has advised that these changes to the language of the E&O policy are in process.

<sup>65</sup> The E&O policy is clear that the Insured cannot bind the insurer by voluntarily assuming an obligation or entering into a settlement without the consent of the insurer.

insurer to investigate, defend, and settle Claims as it deems expedient; so it appears that the insurer does have a process for evaluating direct claims by Claimants. Additionally, although the E&O policy does include foreclosure by the Mortgagee as one of the conditions to coverage for the Mortgagee, it allows for alternative conditions where the Mortgagee: (i) attempted to foreclose but could not do so due to the Incident; (ii) made a determination that it was not economical to do so and charged off the Mortgage; (iii) received a repurchase demand from a third-party purchaser and resold the loan in an arms-length transaction; or (iv) was required to renegotiate the terms of a loan purchase agreement.

With regard to the duty to defend, the Coverage section of the E&O policy does provide that the insurer has the right and duty to defend Suits against the Insured that seek Damages (which, by definition are incurred by a Claimant) that would be covered by the policy. As is the case under a title insurance policy, the insurer has the right to select defense counsel<sup>66</sup> (and will not reimburse the Insured for expenses they incur retaining their own counsel), the Insured has a duty to cooperate with the insurer, and the Insured cannot bind the insurer by voluntarily assuming an obligation or entering into a settlement without the consent of the insurer. This duty to defend appears to give covered lenders and borrowers a vehicle for pulling the insurance company into a lawsuit involving an Incident by naming or adding Voxtur, but it is not clear that this duty to defend would be independently triggered by a litigation initiated by a third-party who is not a “Claimant,” even if it involved a title issue that was related to an “Incident.”

Another distinguishing factor between Voxtur AOL and title insurance with respect to the duty to defend is the fact that Voxtur’s E&O policy limits “Claim Expenses” to \$50,000 per Incident. The definition of Claim Expenses includes, among other things and subject to certain exclusions, all attorney’s fees and costs resulting from “the investigation, adjustment, Settlement, defense or appeal of a Claim...” In our experience, the litigation of title issues can often become complicated and take several months, and sometimes years, to resolve, depending on the jurisdiction. Voxtur’s position on this issue is that its carrier is motivated to resolve Claims as quickly as possible, and it is highly unlikely that Claim Expenses related to a given Incident would ever exceed \$50,000. However, we believe this cap on Claim Expenses under Voxtur’s E&O policy represents another potential risk that a borrower or lender would have to weigh in its decision regarding whether to purchase a Voxtur AOL or traditional title insurance.

#### ***D. Comparison of Closing Protection Coverage***

Closing Protection Letters (“CPLs”) are added protection issued by title insurance companies to protect the lender and homeowner from misconduct or misapplication of funds by the closing agent. Some industry participants we spoke with expressed the concern that AOLs do not involve closing protection coverage, creating exposure for lenders that would outweigh any benefits associated with AOL coverage. However, Voxtur, for example, offers a CPL in connection with Voxtur AOL, which they advised us costs a flat rate of \$50 across the country.

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<sup>66</sup> But under the E&O policy there is no express right of the Insured to object to the selection for reasonable cause.

Voxtur's CPL contains almost identical language to the ALTA Closing Protection Letter, and certain aspects of Voxtur's CPL provide greater protection than the ALTA Closing Protection Letter. For example, the ALTA Closing Protection Letter permits claims to be made under the CPL for one year after closing, whereas Voxtur's CPL covers claims for up to two years after closing.

UWM requires the settlement agent to issue a Closing Indemnification Letter which also contains similar coverage to a traditional CPL.<sup>67</sup> The Closing Indemnification Letter, which is available on UWM's website, is sparser than a traditional CPL, with significantly fewer exclusions.<sup>68</sup> This is likely because UWM has prepared the Closing Indemnification Letter for its own benefit, or the benefit of its correspondent lenders.

## X. Conclusion

- **Enhanced AOL products offer more coverage than their traditional AOL predecessors. However, these products cannot “insure” against unknowable risks, and the lack of Endorsements to supplement enhanced AOL products creates additional gaps in coverage between these products and traditional title insurance. With that said, title defects are relatively rare, and some consumers and lenders may be willing to assume these risks where cost savings can be achieved through purchasing an enhanced AOL in lieu of a title insurance policy. Others may prefer more certainty and greater protection. For these reasons, we believe that there is room for both types of products to exist in today's market.**

Although enhanced AOLs represent an improvement over traditional AOLs with regard to scalability, scope of coverage, and the claims process, significant differences remain between these products and title insurance. Because AOLs cannot “insure” against unknowable risks, these products are not able to provide coverage for certain claims related to fraud, forgery, lack of authority/capacity, or other unknowable defects in the chain of title that may be covered by a title insurance policy. Similarly, while enhanced AOLs and title policies share many similar exclusions and exceptions, the inability of an attorney to “insure” over these with something similar to an Endorsement, can result in additional gaps in coverage. With regard to the claims process, we believe the enhanced AOLs are moving in the direction of title insurance by extending protections to successors-in-interest, providing an obligation to defend, and allowing for submission of claims directly to an E&O insurer without first establishing negligence, but additional refinements should (and can) be made to these processes as these products continue to evolve.

Although current enhanced AOL products may fall short of title insurance in several respects, as outlined in this analysis, the potential savings afforded by utilization of an AOL in lieu of a title insurance policy

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<sup>67</sup> Steve Gottheim, *Unregulated Title Alternatives Update* (American Land Title Association Presentation to National Association of Insurance Companies Title Insurance Task Force, 2023), [https://content.naic.org/sites/default/files/national\\_meeting/Title%20Insurance%20Task%20Force%20Materials%201\\_0.pdf](https://content.naic.org/sites/default/files/national_meeting/Title%20Insurance%20Task%20Force%20Materials%201_0.pdf).

<sup>68</sup> Use *TRAC to Give Borrowers Big Savings at Closing*, UNITED WHOLESAL MORTGAGE (last visited July 24, 2023), <https://www.uwm.com/manage-your-pipeline/pipeline-tools/trac>.

could be significant (depending on the transaction and the state where the property is located). Because of the scarcity of title claims generally<sup>69</sup> and the fact that non-covered AOL claims would be a subset of this already small population,<sup>70</sup> some entities and individuals may decide that the cost savings associated with utilization of an enhanced AOL outweighs the additional risk created by this gap in coverage. For others, the broader coverage and certainty provided by a title policy may be worth the additional cost, even if they believe a future claim is unlikely.

Ultimately, given the multitude of borrower and lender transaction types and circumstances, insistence on a one-size-fits-all approach to insuring (or assuring) against title defects is not in the interest of the consumer. Our industry and its regulators generally recognize that competition is good for consumers, and although these products do threaten the relative monopoly the title insurance industry has enjoyed in this space for some time, it is difficult to imagine them supplanting title insurance as the primary vehicle for protecting against title risks. Rather, as these products continue to grow and evolve, title insurance companies may answer with their own alternatives to traditional title insurance or could respond with premium reductions. The net effect of all of this is more options for consumers. Provided that these consumers have access to all of the information needed to make informed decisions regarding the coverage that is best for them, there is no reason these products cannot coexist in today's market.

For more information or assistance, contact Jonathan Moore, Louise Marencik, or Wayne Streibich in Blank Rome's Financial Institutions Litigation and Regulatory Compliance ("FILARC") group.

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<sup>69</sup> During our call with representatives of ALTA, they acknowledged that only about 3-5% of policies ever have claims submitted, with the 5% number relating to periods of economic instability, like the financial crisis.

<sup>70</sup> In our discussions with ALTA and several title insurance companies prior to the publication of this article, we requested data breaking down claims filed (and covered) by type, in an effort to parse the potential impact of the gaps in coverages, but they declined to provide this information.