

**WELCOME**

**Title Insurance:  
Update &  
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SEMINAR**



**CHICAGO TITLE  
INSURANCE COMPANY**  
NATIONAL COMMERCIAL SERVICES



**Commonwealth**  
LAND TITLE INSURANCE COMPANY  
NATIONAL COMMERCIAL SERVICES



**Fidelity National Title**  
Insurance Company  
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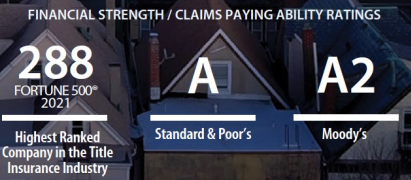
# CURRENT MARKET

- Open Orders Q1 '22 vs Previous Several Years
- Revenues Last Year Compared to Previous Years
- Staffing Increases
- 2021 Total Closed Orders

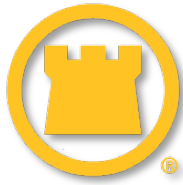


## Full Year 2021 Financial Highlights

Fidelity National Financial is the nation's largest title insurance company through its title insurance underwriters – Fidelity National Title, Chicago Title, Commonwealth Land Title, Alamo Title and National Title Insurance of New York – that collectively issue more title insurance policies than any other title company in the United States.







# PRESENTERS



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The Forms Committee is charged with maintaining a quality standard title insurance product that is responsive to the needs of proposed insureds. The current versions of the standard ALTA Owner's and Loan Policies of Title Insurance were published in 2006. Legislation, regulation, judicial proceedings and business practices have changed the title insurance landscape over time. These Discussion Drafts have been in formulation for four years or longer.

The 7/1/2021 ALTA forms include a fresh Commitment, Owner's Policy, and Loan Policy.





# THE 2021 ALTA POLICY FORMS REVIEW

## Electronically issued policies. New Preamble.

“This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is **issued electronically** or **lacks any signature.**”

- ALTA 39 endorsement is now moot





# COVERED RISKS





# Highlights: COVERED RISKS



## Electronic/Lack of Signature

The new policies acknowledge that the Insurer will not deny liability because the policy is issued electronically or lacks any signature. This was previously the ALTA 39 coverage which is now moot.



## Covered Risks 2(a)(iii) and 2(a)(iv)

These Covered Risks address remote electronic notarization and include insurance against invalidity of a document affecting Title as a result of repudiation of the electronic signature because the electronic signature was not valid.



## PACA-PSA Trust

Adds a conditional Covered Risk relating to any PACA-PSA Trust



## Particular Obligations and Expenses

Expands the coverage of insurance against lack of priority of the Insured Mortgage to refer to particular obligations and expenses.



## Court Orders

Adds coverage for certain court orders providing an alternative remedy in a claim of a voidable or fraudulent transfer or voidable preference.



## COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, *Blank Title Insurance Company*, a *Blank* corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
  - a. a defect in the Title caused by:
    - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
    - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
    - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
    - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
    - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
    - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
    - vii. a defective judicial or administrative proceeding; or
    - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
  - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
  - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:
  - a. the occupancy, use, or enjoyment of the Land;
  - b. the character, dimensions, or location of an improvement on the Land;
  - c. the subdivision of the Land; or
  - d. environmental remediation or protection on the Land.
6. An enforcement of a governmental forfeiture, police, regulatory, or national security power, but only to the extent of the enforcement described by the enforcing governmental authority in an Enforcement Notice.
7. An exercise of the power of eminent domain, but only to the extent:
  - a. of the exercise described in an Enforcement Notice; or
  - b. the taking occurred and is binding on a purchaser for value without Knowledge.
8. An enforcement of a PACA-PSA Trust, but only to the extent of the enforcement described in an Enforcement Notice.
9. The Title being vested other than as stated in Schedule A or being defective or a court order providing an alternative remedy:
  - a. resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction vesting the Title because that prior transfer constituted:
    - i. a fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights law; or
    - ii. a voidable transfer under the Uniform Voidable Transactions Act; or
  - b. because the instrument vesting the Title constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights law by reason of the failure:
    - i. to timely record the instrument vesting the Title in the Public Records after execution and delivery of the instrument to the Insured; or
    - ii. of the recording of the instrument vesting the Title in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the deed or other instrument vesting the Title in the Public Records.

# Summary of Changes in the COVERED RISKS

The following Covered Risks on Title are unchanged in the draft:

Covered Risk 1 on Title Vesting

Covered Risk 3 on Marketable Title

Covered Risk 4 on Right of Access

**Covered Risk 2(b)** on real estate taxes and assessments is also unchanged, but:

- Covered Risk 2(a), that lists defects in the Title, is changed including by adding 2(a)(viii); and
- Covered Risk 2(c), on survey coverage, is rewritten to avoid confusion





# THE 2021 ALTA POLICY FORMS REVIEW

## Remote Online Notary

2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
  - a. a defect in the Title caused by:
    - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized **(including by remote online notarization)**, or delivered;



# THE 2021 ALTA POLICY FORMS REVIEW

## Repudiation of Electronic Signatures

2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
  - a. a defect in the Title caused by:
    - viii. **a defective judicial or administrative proceeding; or the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.**





# THE 2021 ALTA POLICY FORMS REVIEW

## Definition of “Enforcement Notice”

The government action referenced in Covered Risks 5, 6, 7, and 8 and Exclusion 1 use a new five-element definition of **Enforcement Notice** introduced in Condition 1(o):

**Enforcement Notice:** A document affecting the Title, recorded in the Public Records at Date of Policy, that describes any part of the Land and identifies a violation or enforcement of a **law, ordinance, permit, or governmental regulation, exercise of a power, or enforcement of a PACA-PSA Trust.**



# THE 2021 ALTA POLICY FORMS REVIEW

## PACA Trusts – What is a PACA Trust

- “PACA” is the Perishable Agricultural Commodities Act
- When a seller of commodities notes on the invoice that the seller is asserting a PACA trust, a statutory trust on the commodities and their proceeds is established
- Became a title issue when a NY Court held that an unpaid PACA trust can have/has a lien on land superior to all other creditors as of the date the seller sold the commodities and gave notice of the establishment of a PACA trust





# THE 2021 ALTA POLICY FORMS REVIEW

## Dealing with possible PACA Trusts

The result of the new policy forms is that this issue should now be considered “off the table.”

While there is a Covered Risk 8 for PACA/PSA trusts, it is only to the extent they are contained within an Enforcement Notice.

There is a corresponding Exclusion for the typical inchoate PACA/PSA trusts.



# THE 2021 ALTA POLICY FORMS REVIEW

## **Lack of Priority – Covered Risk 10 (Expanded Coverage)**

The Loan Policy now identifies for priority coverage purposes certain components to define the term “Indebtedness” to include:

- a) The amount of the principal disbursed as of Date of Policy
- b) The interest on the obligation secured by the Insured Mortgage
- c) The reasonable expenses of foreclosure
- d) The amount advanced to pay real estate taxes and reasonable insurance premiums

Consider the ALTA 14 series of endorsements to cover future advances as defined by that Endorsement.



# EXCLUSIONS





# HIGHLIGHTS: EXCLUSIONS

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**Exclusion 1(b) includes forfeitures**



**Exclusion 6(b) of the Loan Policy and Exclusion 4(b) of the Owner's Policy (Creditor's Rights)**

Exclude "a voidable transfer under the Uniform Voidable Transactions Act," which refers to a "voidable transfer" *instead* of "fraudulent transfer." The Exclusions also exclude a claim that the transaction wasn't made as a contemporaneous exchange for new value.



**Exclusion 7 of the Loan Policy and Exclusion 5 of the Owner's Policy**

Exclude claims arising out of a statutory trust under PACA and PSA.



**Exclusion 8 of the Loan Policy and Exclusion 6 of the Owner's Policy**

Exclude governmental taxes or assessments (such as PACE assessments) due and payable after Date of Policy.



**Exclusion 9 of the Loan Policy and Exclusion 7 of the Owner's Policy**

Exclude liability for the quantity of area, square footage, or acreage. – *FINALLY!*



# Summary of Changes in the EXCLUSIONS

REVISED

2021

The 2021 **Exclusion 1** was revised to:

1. a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) **that restricts, regulates, prohibits, or relates** to:
  - i. the occupancy, use, or enjoyment of the Land;
  - ii. the character, dimensions, or location of any improvement on the Land;
  - iii. the subdivision of land; or
  - iv. environmental **remediation or** protection;
- b) Any governmental police power.
- c) **The effect of a violation or enforcement of a matter excluded under Exclusion 1(a) or 1(b), unless an Enforcement Notice describes the violation or enforcement.**



# Summary of Changes in the EXCLUSIONS

2021



REVISED

The 2021 **Exclusion 5** was revised to:

5. Invalidity or unenforceability, in whole or in part, of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon **usury law or any Consumer Protection Law or consumer credit protection law.**

NEW

Condition 1(c) adds a definition for:

1. DEFINITION OF TERMS...
  - c) **Consumer Protection Law: Any law regulating trade, lending, credit, sale, and debt collection practices involving consumers; any consumer financial law; or any other law relating to truth-in-lending, predatory lending, or a borrower's ability to repay a loan.**



# Summary of Changes in the EXCLUSIONS

2021

REVISED

The 2021 **Exclusion 6** was revised to:

5. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
  - a) a fraudulent conveyance or fraudulent transfer,
  - b) a voidable transfer under the Uniform Voidable Transactions Act, or
  - c) a preferential transfer
    - i. to the extent the Insured Mortgage is not a transfer made as a contemporaneous exchange for new value or
    - ii. for any other reason not stated in Covered Risk 13(b).





# Summary of Changes in the EXCLUSIONS

2021

NEW

## New Exclusion 7:

7. Any claim of a PACA-PSA Trust. Exclusion 7 does not modify or limit the coverage provided under Covered Risk 8.

REVISED

## New Exclusion 8 is former Exclusion 7 and is revised to:

8. Any lien on the Title for real estate taxes or assessments imposed or collected by governmental authority due and payable after Date of Policy. Exclusion 8 limits Covered Risk 14, but does not modify or limit the coverage provided under Covered Risk 14.

NEW

## New Exclusion 9:

9. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any Improvement to the Land.



# THE 2021 ALTA POLICY FORMS REVIEW

## New Acreage Exclusion

**“Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.”**

This language has been a Schedule B exception any time acreage was referenced in a legal description. With this exclusion, there will be one less exception and the Insured may see the acreage calculation in the legal description consistent with how it appears in the deed.



# THE SCHEDULES



# THE 2021 ALTA POLICY FORMS REVIEW

## New Schedule A optional provisions Transaction Data and List of Endorsements

**Optional** Transaction Identification Data at the top of Schedule A:

Transaction Identification Data for reference only:

Issuing Agent:

Issuing Office:

ALTA® Registry ID:

Loan ID Number:

Issuing Office File Number:

Property Address:





# THE 2021 ALTA POLICY FORMS REVIEW

## Schedule B – Unlawful CCR’s Global Exception

Some historical land records contain **Discriminatory Covenants** that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is **redacted, repudiated, removed, and not republished or recirculated**. Only the remaining provisions of the document are excepted from coverage.

**NEW** Definition in Condition 1.e. (LP) and 1.d. (OP)

“Discriminatory Covenant”: Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.



# CONDITIONS



## Highlights: CONDITIONS

### Public Records

The definition of Public Records is modified, consistent with the prevalent understanding, to exclude environmental protection, planning, permitting, zoning, licensing, building, health, or public safety matters unless a Record Title Notice is filed in the Public Records.

### Consumer Protection Laws

A new definition of **Consumer Protection Laws** is included in the Loan Policy.

### Affiliate

The definition of Insured is expanded in both the Owner's Policy and the Loan Policy with respect to a grantee of the Insured that is an **Affiliate**, and foreclosure or deed in lieu of foreclosure by an Affiliate.

### Condition 8

Condition 8 states that the policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of Title, and that the Company shall not be liable for any claim alleging negligence or negligent misrepresentation. **Consistent with the 2016 ALTA® Commitment form NOTICE**

Condition 8(b) establishes an explicit date for determination of the amount of loss or damage

- [1] date of notice of claim or [2] date of foreclosure as chosen by the Insured if **Loan Policy**, or
- [1] date of notice of claim or [2] date liability is finally established if **Owner's Policy**

### Condition 17

Condition 17 of the Loan Policy and Condition 18 of the Owner's Policy **disclaim class action in arbitration.**



# THE 2021 ALTA POLICY FORMS REVIEW

## Intercompany and other transfers.

The definition of **Insured** is expanded in both the Owner's Policy and the Loan Policy with respect to a grantee of the Insured that is an **Affiliate**, and foreclosure or deed in lieu of foreclosure by an Affiliate.

### “Affiliate”: An Entity:

- i. that is wholly-owned by the Insured; *(child)*
- ii. that wholly-owns the Insured; *(parent)* or
- iii. if the Entity and the Insured are both wholly-owned by the same person or Entity. *(sibling)*





# THE 2021 ALTA POLICY FORMS REVIEW

## Intercompany and other transfers.

The definition of **Insured** is also expanded in the Owner's Policy to include:

**(c) a spouse who receives the Title because of a dissolution of marriage;**

**(d) a transferee by a transfer effective on the death of the Insured as authorized by law; or**

**(e) Title obtained from another Insured (co-tenant)**



# ALTA ENDORSEMENTS



# ZONING – ALTA 3 Series

- **ALTA 3: Zoning**
- **ALTA 3.1: Zoning - Completed Structure**
- **ALTA 3.2: Zoning - Land Under Development**
- **ALTA 3.3: Zoning - Completed Structure – Non-Conforming Use**
- **ALTA 3.4: Zoning – No Zoning Classification**



# ALTA 3-06

## ZONING UNIMPROVED LAND

Most basic zoning coverage

Insures against loss if the stated use is prohibited by a final court order invalidating the zoning ordinance.

No coverage for failure to comply with any conditions, restrictions, or requirements contained in the zoning ordinance, including consents or authorizations.

No coverage based upon the refusal of any person to buy, lease or loan against the land due to a zoning matter (marketability).





# ALTA 3.1-06

## ZONING – COMPLETED STRUCTURE

Only used with **already** improved property

Same coverage as ALTA 3-06, but also insures against loss because of:

- a) An area, width, or depth violation;
- b) A floor space area violation;
- c) A setback line violation;
- d) The height of the structure; or
- e) A violation with respect to the number of required parking spaces.





# ALTA 3.2-06

## ZONING LAND UNDER DEVELOPMENT

Adopted April 2012

3.1-06 only available for **already completed** improvements

3.2-06 for use with improvements **to be constructed** based on a set of “Plans” referred to in the endorsement

Provides same basic coverage as the Zoning for already improved land.





# ALTA 3.3-06

## ZONING – COMPLETED STRUCTURE NON-CONFORMING USE

Where existing building is a Non-Conforming Use under the zoning classification

Ensures the enforceability of a **use** that is not allowed in the zoning classification

It does not insure against:

- the lack of compliance with any condition, restriction, or requirement contained in a Zoning Ordinance
- failure to secure necessary consents or authorizations
- invalidity of a Zoning Ordinance,
- Any change in the Non-Conforming Use
- A prohibition to restore an Improvement;
- lack of compliance with any law or rule
- Any refusal to purchase or lend money on the Title





# ALTA 3.4-06

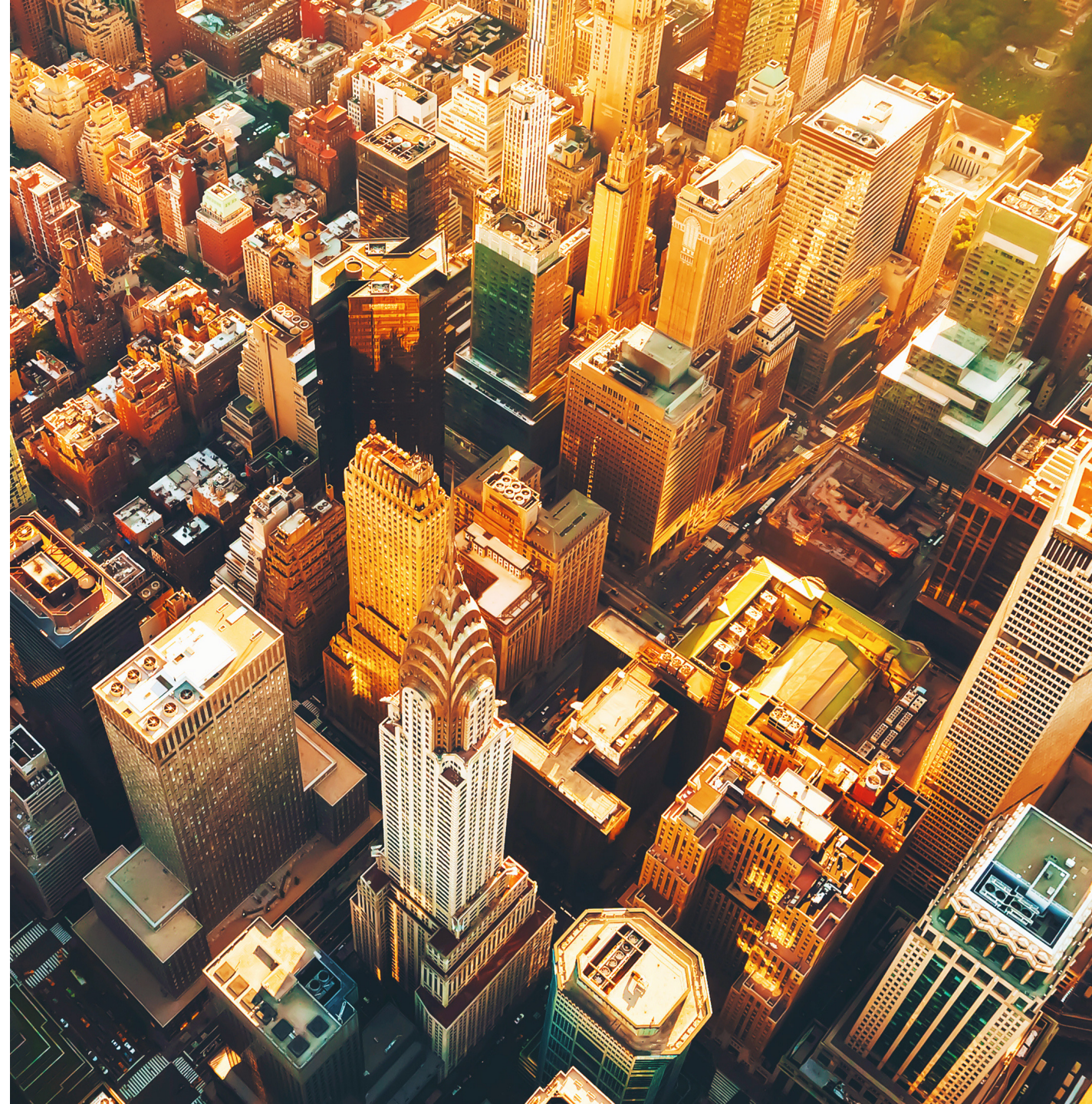
## ZONING – NO ZONING CLASSIFICATION

When there is no zoning ordinance affecting the land

Insures that no zoning classification affects the use of the land at the Date of Policy

Also insures against violations of:

- the area, width, or depth of the Land,
- the floor space area of an Improvement,
- setback requirements,
- height requirements, and
- the number of parking spaces





# ZONING – ALTA 3 Series

For the zoning endorsements, the most challenging issue we face is when customers want more coverage than we have information to support.

For instance, if we only know the zoning class & permitted uses the 3.1 is not available without more underwriting.

For the 3.2, we need a set of government-approved site plans showing the Land when built will be compliant.





# ENVIRONMENTAL LIEN ENDORSEMENTS

## **ALTA 8.1-06 (Environmental Protection Lien) – RESIDENTIAL TRANSACTIONS ONLY**

Insures: (a) Priority of mortgage over any unrecorded or unfiled environmental protection lien  
(b) Against a lien under a lien created by state statute, unless the lien is based upon a statute listed in the endorsement or is expected to in Schedule B of the policy.

## **ALTA 8.2-06 (Commercial Environmental Lien) – COMMERCIAL TRANSACTIONS ONLY**

Only contains the coverage in (a) above.





# ALTA 9 COMPREHENSIVE ENDORSEMENTS

## PRE-NATIONWIDE V. COMMONWEALTH RULING

Prior forms covered against:

- Present violations of CCR's
- Present violations of setback lines on recorded plat
- CCR's that also create: easements; private assessments and lien rights; options to purchase; rights of 1<sup>st</sup> refusal, ability to approve a future owner or tenant (now Private Rights)
- Certain encroachments
- A recorded notice of environmental protection violations
- Damage to improvements – exercise of easement rights
- Damage to lawns, shrubbery, and trees because of exercise of mineral rights.



## POST-NATIONWIDE V. COMMONWEALTH RULING

Revamping of the ALTA 9 endorsements:

- New definition of **“Covenants”** – we now talk about a covenant, not entire instruments
- New definition of **“Improvements”** – not just buildings
- New definition of **“Future Improvements”**
- New definition of **“Private Right”**
- No longer use the “unless expressly excepted” language
- Several new forms



## ALTA 9-06: Restrictions, Encroachments, Minerals – Loan Policy

- Most closely resembles the prior ALTA 9 for Loan Policy
- Provides coverage for:
  - Violation of a Covenant that impairs the insured mortgage (3.a)
  - Violation of a Covenant - unless excepted to in Schedule B. (3.b)
  - Forced removal of an Improvement due to a violation of a setback line on a recorded plat - unless excepted to in Schedule B. (3.c)
  - Recorded notice of an environmental Covenant violation - unless excepted to in Schedule B. (3.d)
  - Encroachments – Improvements and Easements (Section 4)
- No Private Right Coverage

**ALTA 9 Loan Policy Forms**



# ALTA 9-06: Restrictions, Encroachments, Minerals – Loan Policy

- **Encroachment coverage (Section 4)**
  - Encroachment of an Improvement onto adjacent land or onto an easement, unless there is an exception in Schedule B. (Section 4.a.i)
  - Encroachment of an Improvement on adjoining land onto the land, unless there is an exception in Schedule B. (Section 4.a.ii)
  - A court order requiring removal of an encroachment of an Improvement onto adjoining land. (Section 4.b)
  - Damage to an Improvement due to the exercise of the right to use or maintain an easement. (Section 4.c.i)
  - Damage to Improvements from the future exercise of existing mineral rights excepted from the legal description or on schedule B. (Section 4.c.ii).
- **Note: The exclusions in Section 5 includes a Covenant in a Lease**



## ALTA 9.3-06: Covenants, Conditions & Restrictions – Loan Policy

- More Limited Coverage than the 9-06
- Provides Coverage for:
  - Violation of a Covenant that impairs the insured mortgage **(3.a)**
  - Violation of a Covenant - unless excepted to in Schedule B. **(3.b)**
  - Forced removal of an Improvement due to a violation of a setback line on a recorded plat - unless excepted to in Schedule B. **(3.c)**
  - Recorded notice of an environmental Covenant violation - unless excepted to in Schedule B. **(3.d)**
- No Private Right, encroachment (other than platted setback lines) or mineral coverage

**ALTA 9 Loan Policy Forms**



## ALTA 9.6-06: Private Rights – Loan Policy

- Private Rights now in a separate endorsement
- ALTA 9.6-06 is meant to deal with coverage that was in the prior ALTA 9 dealing with the rights of private parties
- “Private Right” means:
  - (i) A private charge or assessment
  - (ii) An option to purchase
  - (iii) A right of 1<sup>st</sup> refusal
  - (iv) A right of prior approval of a future purchaser or occupant
- Provides Coverage against a loss due to the exercise of a Private Right contained in a Covenant that impairs the Insured Mortgage.

# ALTA 9 Loan Policy Forms



## ALTA 9.6-06: Private Rights – Loan Policy (continued)

- Endorsement must be underwritten (CCR's reviewed) and may require:
  - SNDA
  - Waiver of option, right of refusal etc.
  - Confirmation Assessments have been paid.
- Remember, we are not insuring that these items do not exist, but that the Private Right will not impair the mortgage.
- Even if we are able to insure for the subject transaction, there may be an exception in paragraph 4(d) for future transactions.





## ALTA 9.7-06: Restrictions, Encroachments, Minerals – Land Under Development – Loan Policy

- Part of a new line of ALTA Endorsements dealing with Future Improvements under a set of particularly described Plans.
- “**Future Improvement**” means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed or affixed to the Land in the locations according to the Plans that by law constitute real property
- “**Plans**” means the survey, site and elevation plans or other descriptive drawings prepared by [reference to the plans]
- Provides similar coverage to the ALTA 9-06 for the future development

# ALTA 9 Loan Policy Forms



## ALTA 9.10-06: Restrictions, Encroachments, Minerals – Current Violations – Loan Policy

- Adopted - April 2, 2013
- More limited coverage than the 9-06
- PAY NO ATTENTION TO THE TITLE OF THE ENDORSEMENT
- The 9.10 gives more limited coverage insuring that there is not a violation of a Covenant that impairs the mortgage as of the Date of Policy.
- **Does not provide coverage after the Date of Policy.**

**ALTA 9 Loan Policy Forms**



# SUGGESTED LOAN POLICY FORMS TO USE:

- ALTA 9-06 (Restrictions, Encroachments, Minerals-Loan Policy); &
- ALTA 9.6-06 (Private Rights-Loan Policy)
- ALTA 9.7-06 (Restrictions, Encroachments, Minerals-Land Under Development-Loan Policy). In lieu of the 9-06 if you have Land Under Development Plans

## ALTA 9 Loan Policy Forms



## **ALTA 9.1-06 (Covenants, Conditions & Restrictions – Unimproved Land – Owner’s Policy)**

- Coverage for an Owner where the land is not improved
- Provides Coverage for:
  - Violation of a Covenant - unless excepted to in Schedule B. (3.a)
  - Recorded notice of an environmental Covenant violation - unless excepted to in Schedule B. (3.b)



# **ALTA 9 Owner's Policy Forms**

## ALTA 9.2-06 (CC&R's – Improved Land – Owner's Policy)

- Coverage for an Owner where the land is already improved
- Provides Coverage for:
  - Violation of a Covenant - unless excepted to in Schedule B. (3.a)
  - Forced removal of an Improvement due to a violation of a setback line on a recorded plat - unless excepted to in Schedule B. (3.b)
  - Recorded notice of an environmental Covenant violation - unless excepted to in Schedule B. (3.c)
  - **Note: for Easement/Encroachment coverage – ALTA 28**



## ALTA 9.8-06 (CC&R's – Land Under Development – Owner's Policy)

- Part of a new line of ALTA Endorsements dealing with Future Improvements
- **“Future Improvement”** means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed or affixed to the Land in the locations according to the Plans that by law constitute real property
- **“Plans”** means the survey, site and elevation plans or other descriptive drawings prepared by [reference to the plans]
- Provides similar coverage to the ALTA 9.2-06



# ALTA 9 Owner's Policy Forms



## **ALTA 9.9-06 (Private Rights – Owner's Policy)**

- Adopted - April 2, 2013
- Coverage similar to the ALTA 9.6 for lenders
- No assessment coverage for Owner's
- Fills a gap in coverage in the new ALTA 9 series.



# **ALTA 9 Owner's Policy Forms**

## SUGGESTED OWNER'S POLICY FORMS TO USE

- ALTA 9.2-06 (Covenants, Conditions and Restrictions-Improved Land-Owner's Policy)
- ALTA 9.9-06 (Private Rights-Owner's Policy)
- ALTA 9.8-06 (Restrictions, Encroachments, Minerals-Land Under Development-Owner's Policy)
  - In lieu of the 9.2-06 if you have Land Under Development



# ALTA 9 Owner's Policy Forms

# Mortgage Modification – ALTA 11's

This is insuring the continuing priority of a mortgage upon modification.

The underwriting can vary based on state statute and the pricing will also widely vary for this.



# Tie-In – ALTA 12's

The “tie in” endorsement will aggregate the total value of a series of loan policies to allow the Insured lender to have coverage based on the sum of all debt, but only to the extent a portion of the Land insured by the policies has the increased value.

ALTA 12 (Aggregation Loan). The base form to be used (in state's where permitted) to “tie-in”

ALTA 12.1 (Aggregation-State Limits-Loan). The form to be used in situations where some state limits have been reached.



# Future Advancement – ALTA 14

- Used in situations where “advances” are to be made after Date of Policy
- Lender wants the Title Company to insure that the subsequent advances:
  - Are secured by the security instrument; and
  - Have priority over all liens & encumbrances (except as originally listed in Schedule B)
- Without the Future Advance Endorsement, most advances made after the Date of Policy would not be covered.
- State law specific. Documents must be reviewed carefully to make sure they conform to any state specific requirements.



## Future Advancement – ALTA 14 CONTAINS BROAD COVERAGE

- Affirmatively insures the priority and enforceability of the lien of the insured mortgage with respect to the future advance.
- Covers repayments and re-advances of Indebtedness (Revolving Credit)
- Includes Variable Rate Coverage (including negative amortization)
- Insures priority and enforceability of advances made when the principal is reduced to zero
- Assurance that state law requirements have been met





# Future Advancement – ALTA 14 EXCLUSIONS

No coverage is provided under the endorsement:

- (a) For validity, enforceability and priority of an advance made after the filing of a BR petition
- (b) For priority over real estate tax liens.
- (c) For priority over federal tax liens except as set forth in the endorsement.
- (d) For priority over federal or state environmental protection liens
- (e) With respect to usury, consumer protection or TIL
- (f) For priority over any mechanics or materialmen's lien (this may be taken out depending on the state)



# Future Advancement – ALTA 14 FORMS

**ALTA 14-06 (Future Advance-Priority):** This form is used where state law provides for absolute priority of a future advance without regard to knowledge

**ALTA 14.1-06 (Future Advance-Knowledge):** This form is used where state law provides for priority of a future advance so long as the lender does not have actual knowledge of an intervening matter. You cannot use this form in states where the priority of the advance is subject to the constructive notice of the lender unless an additional exclusion is added to the endorsement.

**ALTA 14.2-06 (Future Advance-Letter of Credit):** This form is used when the future advance is to be pursuant to a LOC

**ALTA 14.3-06 (Future Advance-Reverse Mortgage):** This form is used in situations where a reverse mortgage is involved.



# Mezzanine Financing – ALTA 16

In a “Mezz” loan, the lender is taking a security interest in the owning entity stock/partnership/membership interests, rather than the underlying real property.

The Lender does not have an insurable interest in the land so no loan policy is available.

The mezz endorsement essentially assigns the coverage of the Owner’s Policy to a mezzanine lender upon foreclosure.

The Mezz Endorsement includes non-imp style coverage, where the TC agrees not to assert the acts of the insured defenses (Exclusions 3(a), (b), or (e)) against the mezz lender if the mezz lender has no knowledge of the defect etc.



# Mezzanine Financing – ALTA 16 (cont.)

The mezz non-imp coverage is underwritten like the traditional non-imp coverage since similar coverage is provided.

Often, the mezz lender will also obtain a UCC insurance policy to cover the attachment, perfection and priority of the security interest in the ownership interest they are taking as collateral.

It is good practice to have both the Mezz endorsement to the owners' policy in order to have coverage at the property level as well as UCC insurance to have insurance at the entity ownership level that is the security for the mezz loan.



# Access – ALTA 17's

ALTA 17 – provides coverage that the land abuts, and has actual vehicular and pedestrian access to a designated publicly maintained right of way and that the Insured has the right to use existing curb cuts.

ALTA 17.1 – contains the same coverage where access is pursuant to an easement.

ALTA 17.2 – right of access to specified utility service.

Typically, the TC will rely on the surveyor to show the right of access on the ALTA/NSPS survey.

It is possible you will need both the 17 and 17.1 if you have access by way of a publicly dedicated and maintained road, as well as an easement to a private road.

The 17.2 – Utility Access endorsement is also commonly requested in commercial transactions.



# Same as Survey – ALTA 25's

ALTA 25 – Same as Survey Endorsement. This endorsement insures that the legal description of the Land in our policy is the same property depicted on the survey.

Obviously, we will need to have a survey to underwrite the coverage.

The survey should contain the exact same legal description or a statement from the surveyor that the two are the same.





# Subdivision – ALTA 26

The Subdivision Endorsement simply insures that the Land is a legally-created parcel. If the jurisdiction has subdivision regulations, then we must be assured of compliance. If there are no subdivision regulations this is given out like candy!

This is a key endorsement to get if the property you are insuring is subject to subdivision regulations.



# ENCROACHMENT ENDORSEMENTS

**ALTA  
28-06**

## EASEMENT-DAMAGE OR ENFORCED REMOVAL

Insures damage to existing building resulting from the exercise of the right to use or maintain the easement.

**ALTA  
28.1-06**

## ENCROACHMENT-BOUNDARIES AND EASEMENTS

It gives coverage that was previously included in the former ALTA 9 series.

Section 4 creates an exclusion for any instrument listed.

**ALTA  
28.2-06**

## ENCROACHMENTS-BOUNDARIES AND EASEMENTS-DESCRIBED IMPROVEMENTS

Similar coverage to the ALTA 28.1, but definition of Improvements includes each improvement on the land itemized by the endorsement.

**ALTA 9**

The ALTA 9-06 contains encroachment coverage. Only for lender – expanded definition of Improvement.

The ALTA 9.2-06 - owner's encroachment coverage only for violation of a recorded setback line.



# Easements & Encroachments – ALTA 28's

We see frequent requests for these endorsements. A number of factors contribute to our willingness to issue them, including:

- How long the encroachment may have been in place?
- What type of easement is being encroached upon and what potential is there for damage during enforcement of the easement rights (sewers are problematic)?
- How significant is the encroachment? Will it impair the use of the easement?
- Owner's or Loan Policy request?



# ALTA 31-06

## THE SEVERABLE IMPROVEMENTS ENDORSEMENT

Severable Improvement – property that is affixed to the Land but by law does not constitute real property.

A wind turbine, for example, is affixed but movable.

Permits inclusion of the diminution in value of Severable Improvements together with removal and relocation costs in the calculation of loss.

Does not provide coverage for: (i) ownership of the Severable Improvements; (ii) any security interest therein; or (iii) whether the Severable Improvements are real or personal.

This is usually only given in rare cases, for casinos, or some other developments where personal, removable property is considered a major source of the value. See the ALTA 36 series for inclusion of this coverage for energy projects.





# THE IDENTIFIED RISK ENDORSEMENT

## ALTA 34-06

Designated for use when the TC agrees to provide affirmative insurance or to insure over a particular exception.

This Identified Risk is defined in paragraph 1 of the End.

Coverage is provided in the event of a final decree enforcing the Identified Risk or if there is a Marketability issue.

Marketability coverage only applies if:

- There is a contractual condition to deliver marketable title; or
- Neither the Company or another title company is willing to insure over the risk.





# THE IDENTIFIED RISK ENDORSEMENT

## ALTA 34.1-06

The identified risk endorsement is a uniform way of providing what used to be called “affirmative coverage” and where no other endorsement is applicable.

Key practice point is to narrowly identify the risk within the excepted document, rather than just the document itself to be insured over.





**ALTA 37-06**  
**ASSIGNMENT OF**  
**LEASES OR RENTS**

**ALTA 38-06**  
**MORTGAGE TAX**

**ALTA 39-06**  
**POLICY AUTHENTICATION**

**ALTA 42-06**  
**COMMERCIAL**  
**LENDER GROUP**

**ALTA 43-06**  
**ANTI-TAINT**

37

38

39

42

43

Adopted December 3, 2012

Covers:

- Any defect in the execution of the Assignment of Rents or Leases (Section 2.a.
- Any assignment of the Lessor's interest in the rents or leases affecting the Title recorded in the Public Records at Date of Policy (other than those listed in Schedule B.

Adopted December 3, 2012

Insures against impairment of the Insured Mortgage due to the failure to pay the tax at the time of recording.

The endorsement does not insure against a loss resulting from the failure of the Insured to pay the Mortgage Tax.

The Title Company is not liable to pay the Mortgage Tax, just covers a loss if there is an impairment of the mortgage.

Adopted April 2, 2013

Provides that the Title Company will not deny coverage solely because the policy and endorsements were issued electronically.

All that is required is a Policy Number and a Date of Policy.

Another move toward electronic policy delivery.

ALTA loan policy is designed for a single lender.

Many large loans contain a group of participating lenders, which may change over time.

The Commercial Lender Group endorsement acknowledges that change may occur in the "Lender Group" as defined in the endorsement.

The 42-06 insures against the invalidity, unenforceability or loss priority of the insured mortgage due to changes in the Lender Group.

Many commercial loans contain both a Term Loan and a Revolving Credit Loan under the same loan agreement and secured by the same security instrument.

The endorsement provides coverage against loss of priority of the insured mortgage as security for the term loan resulting from the revolving credit loan.

The concept here is to protect the term loan from any novation issue with the revolver caused by reducing the balance of the revolving loan to zero.



# Options – ALTA 46

The Option Endorsement only insures the option contained in a conveyance of Land insured by the base policy, or that there are no other options ahead of the Insured.

A common misconception is that this endorsement somehow operates to insure a stand-alone option agreement. Typically, these “naked options” are not insurable.



# CREDIT UNDERWRITING NON-IMPUTATION



# CREDIT UNDERWRITING – NON-IMP

## Overview

These endorsements provide coverage to an incoming equity investor purchasing all or a portion of an interest in the entity that owns the Land rather than getting a deed to the property.

The Owner's Policy exclusions 3(a), (b) and (e), would potentially disallow any claim by the incoming investor since the Knowledge of the Insured (the entity itself) is imputed to its members.

ALTA 15 (Non-Imputation-Full Equity Transfer)

ALTA 15.1 (Non-Imputation-Additional Insured)

ALTA 15.2 (Non-Imputation-Partial Equity Transfer)



# CREDIT UNDERWRITING – NON-IMP

## The ALTA 15 Forms

**ALTA 15-06 (Nonimputation-Full Equity Transfer)** - this form is used when all the interests in the Insured are being transferred.

### **ALTA 15.1-06 (Nonimputation-Additional Insured)**

- Used when a new interest holder buys an interest in the Insured
- The new interest holder becomes an additional insured under the policy
- The Insured entity must sign the endorsement consenting to the addition of the new interest holder as an insured
- New owner claim limited to the % interest in the Insured
- The policy amount is reduced by any amounts paid to the additional insured.



# CREDIT UNDERWRITING – NON-IMP

## Why is it Underwritten Stringently?

The coverage is for off-record matters, which is generally not “title insurance.” Title insurance is designed to insure against loss or damage based on what is found in the Public Records. However, we sometimes insure based on sufficient affidavits, indemnities, and other materials that can give us satisfactory proof as to the risk.

Whereas a Reps & Warranties Insurer would require extensive documentation and assess a heavy premium, we basically rely on a one-page affidavit and financials. So we have to be VERY SURE.





# CREDIT UNDERWRITING – NON-IMP

## Claim Example -- Non-Imp Endorsement

- In December 2011, Walkers LLC entered into a lease with owner of property.
- Thereafter, Walkers started converting the property, an old school building, to low income housing
- Lease amended in 2013, at which time, Walkers obtained a leasehold policy in the amount of \$15.8MM.
- Walkers LLC was the Named Insured.
- Policy excepted:

Any lien, or right to a lien, for services, labor or material **hereafter** furnished, imposed by law and not shown by the public records

- This coverage was afforded based on a no work affidavit from Walkers LLC.



# CREDIT UNDERWRITING – NON-IMP

## Claim Example -- Non-Imp Endorsement (con't)

Further, as of date of Policy,

- Shane Acquisition owned 99.99% of Walkers LLC
- Glenn Capital owned 0.01% of Walkers LLC
- Managing Member of Walkers LLC: Grimes 99, LLC



# CREDIT UNDERWRITING – NON-IMP

## Claim Example -- Non-Imp Endorsement (con't)

“Non-imputation-Additional Insured” Endorsement, Form 15-1:06, issued. Provides, in part:

- **Shane Acquisition LLC** and **Glenn Capital LLC**, their affiliates, successors and assigns (“Additional Insured”) is added as an Insured under the Policy.

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of **Grimes 99, LLC** whether or not imputed to the Additional Insured by operation of law, to the extent of the percentage interest in the Insured acquired by Additional Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.



# CREDIT UNDERWRITING – NON-IMP

## Claim Example -- Non-Imp Endorsement (con't)

- Two years after the Policy was issued, a mechanic lien for \$1.7M was filed for work provided for and contracted by Grimes 99, as Managing Member of Walkers, LLC, prior to date of Policy
- **The No Work Affidavit – False.**
- Litigation followed with Walkers challenging the mechanic lien and lien claimant asserting claims of fraud and unjust enrichment based on acts of Walkers, Walkers' MM, Grimes 99, and its members.



# CREDIT UNDERWRITING – NON-IMP

## Claim Example -- Non-Imp Endorsement (con't)

- Claim was tendered by Grimes 99, as Managing Member of Walkers, LLC
- Walkers, LLC claim was denied based, in part, on 3(a) – its own acts created the lien
- Claim was then submitted, eight months later, by Shane Acquisition and Glenn Capital, based on the Non-Imputation Endorsement
  - Shane and Glenn are additional insureds AND
  - Acts of Grimes 99, LLC could not be imputed to Shane and Glenn
- Claim resolved with Insureds



# CREDIT UNDERWRITING – NON-IMP

## What Title Companies Need to Underwrite (Affidavit and Strong, Liquid Indemnitor)

- 1) standard form of affidavit/indemnity
- 2) property use
- 3) Any reps and warranties in the PSA?
- 4) How long has the seller owned?
- 5) Any recent construction or ongoing maintenance?
- 6) Who is signing the affidavit and what is their role/basis for knowledge?
- 7) Provide a copy of the proposed completed Endorsement.
- 8) Who is being offered as indemnitor? Financials received?**
- 9) Who are the parties? (outgoing/incoming and % of ownership)**
- 10) Before and after org charts**





# CREDIT UNDERWRITING – NON-IMP

## Practice Tips – Non-Imp

- If you are the seller, carefully consider whether you want to provide the affidavit, indemnity and financial information required by the TC to give the coverage before agreeing to an entity level transaction.
- 
- If you are the buyer, make sure that the purchase agreement is very specific about what the seller must provide the TC.
- Consider sending the proposed form of affidavit and indemnity (and maybe even financials on the indemnitor) to the TC on the front end for review. Remember, the TC is not bound by the provisions in the Purchase Agreement regarding coverage.



# Pending Litigation



If we discover a *Lis Pendens* in our title exam, or otherwise learn of a civil suit affecting the parties or the Land, it will require additional underwriting to determine our ability to insure without exception.

If there is a simple non-property lawsuit (slip & fall, for instance) where no judgment has been taken, we can typically insure without exception.

**OTHER PROBLEM UNDERWRITING ISSUES**

# Rights of First Refusal & Purchase Options

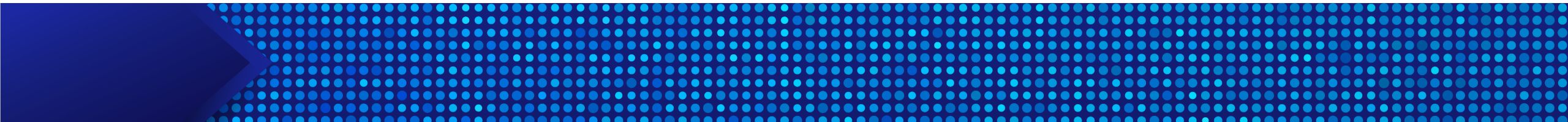


The Private Rights coverage in the ALTA 9.6, 9.6.1, and 9.9 insure against ROFR and Option priority. These endorsements specifically exclude matters contained in a lease. It is essential that ROFR/ROFO, Option rights & other private rights are explicitly waived or terminated. We can't rely on  $1+1=2$  sometimes.

We have seen a several of these become problematic in recent months

**OTHER PROBLEM UNDERWRITING ISSUES**

# QUESTIONS?



# THANK YOU!



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