ALTA Owners' and Lenders' Policies

Getting Ready for Closing

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GETTING READY FOR CLOSING

A. Commitment

The commitment for title insurance or, as it is sometimes known, binder or preliminary report, is prepared and issued for the purpose of advising the proposed purchaser or lender of the status of the title before the transaction is closed and committing the title insurer, upon whose agreement to indemnify the transaction ultimately hinges, to issuing a policy. The commitment for title insurance (Exhibit 9), though it entails insurance, has a strong land informational component, in that it constitutes a detailed composite or profile of the subject matter, the underlying real estate title: The name of the owner, property description, a listing of mortgages or deeds of trust, liens, taxes and matters ordinarily satisfied or released prior to a transfer of the title, and lastly, easements, restrictive covenants and other matters that usually survive the transfer of ownership. A proposed insured is well advised to timely obtain a commitment so that they know for a certainty what liens and encumbrances affect the title and without delay make arrangements or begin negotiations with the appropriate parties for their payment or release.

The ALTA, in addition to having promulgated policies, has also promulgated commitment forms, the standard Commitment form and the ALTA Plain Language Commitment form. Both forms consist of schedules and conditions. There are three distinct schedules: Schedule A, Schedule B –Section I (or "Schedule B – Section 1"), and Schedule B – Section II (or "Schedule B – Section 2"). Each schedule is of indeterminate length, page or image numbers, and may be modified to incorporate by reference any number of attachments or documents. The ALTA acknowledges that there will be regional variations in the commitment form. Depending upon the locale, title insurance providers may incorporate in the ALTA Commitment additional pages, exhibits or attachments, and provide copies of applicable easements, restrictive covenants, condominium declarations etc. Regardless the form or locale, the reader of the commitment must assure themselves that the commitment document that they possess is in fact the complete, not merely a portion of the, commitment, so that their examination of the commitment will in turn prove complete and accurate.

1. Schedule A

Schedule A of the commitment consists of the following:

a. The effective date

The effective date is the date through which the title has been searched and examined by the title company staff. The effective date is not the date on which the commitment was issued, but rather the date through which the public land records are certified by the public records custodian, court clerk and taxing authority as having been indexed, that is, transformed into a searchable condition. Because counties, due to changing staffing and budgetary considerations, vary

considerably in the timeliness of their indexing, commitment effective dates can be expected to vary considerably from month to month and county to county. The effective date, when it is not a recent one, poses a significant risk to the proposed insured: In the event that liens or encumbrances are created after the effective date, they may cause a loss to the insured not covered by the policy. Because the passage of time inevitably increases the likelihood that the title will be marred by recent liens and encumbrances: The earlier the effective date, the greater the risk to the insured that liens of which the insured is unaware have been filed of record.

b. Type of policy

Schedule A indicates, or should indicate, the form or version of the policy the title insurer has committed to issue. In many states, the prevailing owner's policy form is now the ALTA 2006 Owner's Policy, though in the event that the real estate is residential property, the ALTA Residential Policy and the ALTA Homeowner's Policy, or an insurer's proprietary form may also be available. In certain states or localities, there is only one available policy form, but in others, there are a multitude of policy forms, the coverage of which varies, and the choice concerning which the proposed insured may conceivably exercise considerable latitude. Because the underwriting criteria of the title insurer as pertains to policy form will vary, the insured should assure itself prior to closing that the desired policy form is clearly specified at Paragraphs 2(a) or 2(b), or it may find that after the closing, its request for a different form will be rejected due to inadequate documentation needed by the title insurance provider.

c. Name of owner

The commitment is of little value unless it unequivocally identifies the name of the property owner and the estate or real property interest (usually a fee simple estate, but sometimes a lesser estate, so long as it is recognized by state law) that the owner holds.

i. Sensitivity to name spelling

If there is an aspect of title examination in which there is or should be no tolerance of misspelling or typographical error, the owner's name is it. In many states, the entry of a judgment against the name of a debtor gives rise to a lien against all real property of the debtor in the county where entered and docketed. The judgment lien is indexed not by property description, but by *name*. Title personnel accordingly search the parties' names for judgments and federal tax liens by name. Therefore, the spelling of an owner's full name, correctly, will have the effect of generating a reproduction of all liens against the real estate. A misspelling in events leading up to the closing of a transaction, of an owner's name, or the use of an alias or inadequate name, may have the effect, usually unintended, of

a failure to discover liens against the real estate, with the result that a transfer occurs subject to the unsatisfied liens.

ii. Public record error

It is not only in the pre-closing transmission of name information that misspellings may occur. The court judgment record or docket too may reflect a misspelling of the debtor's name. State courts have adopted various positions with regard to the validity of judgment liens, some determining that the judgment lien is invalid unless the debtor's name is spelled correctly, and others enforcing the lien under the theory of idem sonans: The judgment lien is valid if the debtor's name sounds the same as that spelled in the court judgment docket. "The doctrine of idem sonans is that though a person's name has been inaccurately written, the identity of such person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation as written. Therefore, absolute accuracy in spelling names is not required in legal proceedings, and if the pronunciations are practically alike, the rule of idem sonans is applicable." 46 Cal. Jur.3d, Names §4, at p. 110 (footnote omitted). A judgment against "E. G. Seibert" was a lien against the real property of "Eleanor G. Sibert." Green v. Meyers, 98 Mo. App. 438, 72 S.W. 128 (1903). Judgments against "Ed. J. Borstad" were liens against the real estate of "Edward J. Borstad." Stephenson v. Cone, 124 N.W. 439, 440 (S.D. 1910). A judgment against "W. Czerionak" was not a lien against the real property of "Walenty Cierniak", even though the names were idem sonans. Tomczak v. Bergman, 269 Ill. 330, 109 N.E. 1003 (1915). A judgment against "William Duane Elliot" and "William Duane Eliot" was not a lien against the real estate of "William Elliott." Orr v. Byers, 198 Cal. App. 3d 666, 244 Cal. Rptr. 13 (1988).

The federal tax lien attaches to "all property and rights to property." IRC §6321. Do the same standards that apply to name variations involving judgment liens apply to federal tax liens? State law is used to determine whether the taxpayer possessed rights in a particular property at the time the general tax lien arose. However, federal standards will determine issues related to priorities, perfecting of liens, whether liens are sufficiently "choate", and how first-in-time, first-in-right principles apply to lienors. David A. Schmudde, Federal Tax Liens §1.10(c)(2), at 21 (4th ed. 2001). A federal tax lien filed in Florida against "Freidlander" was held adequate, under the doctrine of idem sonans, as against the property of "Friedlander." Richter's Loan Co. v. United States, 235 F.2d 753 (5th Cir. 1956).

So that they do not inadvertently omit a search for judgments and tax liens, depending on the locale, title companies occasionally search for such liens by implementing parallel searches of both full name and name

abbreviations (Rebecca and Becky), language equivalences (Efstathios and Steve), and phonetic equivalences (John and Jon).

iii. Distinction between nominal title holder and owner's legal name

Unfortunately, title insurers do not have access to a nationwide or statewide database of names from which they can discern or trace the current legal name (assuming under the law of the jurisdiction there is one) of the landowner. Names may change, but the public land records usually do not instantaneously reflect the name change. Thus, the name of the owner as it appears in Schedule A is not necessarily the name that the owner, if she is an individual, uses or likes, but rather the name that appears in the chain of title in the public land records. Similarly, if the owner is a business entity, the name may have become changed as a result of corporate merger or acquisition, records pertaining to which the title insurer was not privy when the commitment was issued. Occasionally, after having examined the title the issuing title insurance provider is unable to ascertain to a requisite certitude the name of the owner, and thus a combination of names or title contestants is tentatively listed, from which conveyances will be required.

d. Property description

i. Statutory imperatives

Property descriptions of the kind displayed in Schedule A are not rudimentary or generic in style, but the description that, under the laws of the state, the conveyance that gives rise to the interest insured by the policy will be required to contain in order to be accorded validity. All states have enacted laws, or Statutes of Frauds, that contain the formal requisites that all conveyances are to contain, including the requirement that there exist a description having minimal identifying criteria, in order for a conveyance to be valid. Other statutes that pertain to condominiums, subdivisions and similar land divisions, in turn may require specific criteria. For example, the state's condominium laws may require that the conveyance of a condominium identify the condominium by unit number, building and condominium name. Property descriptions used in conveyances therefore tend to be textually exacting, if not culturally obscure, relative to descriptions used by government agencies and by other professions and businesses.

ii. Descriptions displayed by the title insurance commitment

Title insurers adhere strictly to such statutes, resulting in a certain industry-wide orthodoxy, so that commitments issued by competing title insurers appear remarkably similar. Street addresses, post office box

numbers, property tax parcel numbers or letters, colloquial descriptions, or place names, though indispensable or convenient for various purposes, will not meet the criteria necessary under applicable state law for conveyances, and are unlikely to satisfy the title insurer for the purpose of designing Schedule A. Nonetheless, Schedule A can also serve as a place to engraft onto the perimeter description of the property, appurtenant easements in (and descriptions for) other land, covenants that run with and benefit the insured land, rights of access to abutting public highways, manufactured home serial numbers, and other identifying information that enhances or more clearly expresses coverage.

iii. Who should review the property description in the commitment?

The fact that property descriptions, out of statutory dictates, tend to be unchanging and of rigid syntax does not mean that the description as it appears in the commitment for title insurance, need not be carefully reviewed by the parties before closing. Occasionally, the seller will have entered into an agreement to sell less than all of the land it owns and will retain adjoining land. There is always a risk that the title insurance provider will, when preparing the commitment, describe more or less land than the seller has agreed to convey. The title insurance provider, whose staff does not visit property sites and may not have received for review the purchase agreement, is unlikely to have the same intuitive grasp of the parties' intentions that real estate brokers and counsel often do. Because drafters of conveyances typically mimic the legal description contained in the commitment, a pre-closing failure to timely detect a surplus of land in the commitment is likely to result in a conveyance of more land than the seller intended to convey, followed by a demand or suit that the property be re-conveyed to the seller. The real estate broker and seller's attorney should read the commitment to make sure that the description is in accordance with the seller's intentions. In the event there is any uncertainty about the description's accuracy, a survey of the property should be obtained and reviewed.

2. Schedule B

The ALTA promulgates the commitment form, which consists of Schedule A, Schedule B – Section 1, and Schedule B – Section 2, but acknowledges that it is not always the case that a Schedule B – Section 1 ("Schedule B-1") will be issued. An explanatory note to users displayed by the ALTA Commitment for Title Insurance (6-17-06) states: "In areas where it is not the custom for title companies to state requirements for insurance, the Commitment would be printed without paragraph numbered I of Schedule B and only paragraph numbered II would be shown as a caption for Schedule B."

Schedule B-1 of the commitment, in the states where it is used, contains the *requirements* that must be complied with before the title insurer will issue the policy. Because title insurance is prepared in contemplation of as yet unconsummated transactions rather than to parties that already own and have no intention of acquiring any interest in real estate, the commitment will invariably contain at a minimum, one requirement of singular importance: A requirement specifying the conveyance that is necessary to create the interest of the proposed insured. An explanatory note to users displayed by the ALTA Commitment states: "Note: Appropriate language should be inserted to set forth the requirements of the Company. In many areas, a sub-caption may be used such as: 'Instruments in insurable form which must be executed, delivered, and duly filed for record:' "

a. Road map to closing

The commitment for title insurance is, in contrast to the policy, a work in progress, and in content is subject to discussion or negotiations as the transaction approaches settlement. Negotiability extends to Schedule B – 2 and the exceptions. A practical distinction between exclusions and exceptions is the degree to which title insurers have authorized their removal by authorized agencies: Title insurers generally do not authorize their agencies to delete or modify policy exclusions without the title insurer's specific authorization. However, title insurers do authorize their agencies to delete or modify policy exceptions, a practice that has a direct impact upon the successful marketing of title insurance. Although exclusions and exceptions alike describe matters against which there exists no coverage, exceptions tend to characterize substantive real property defects, liens or encumbrances, the existence of which is capable of investigation, and the risk of which is in many cases subject to elimination.

b. Remaining exceptions

Exceptions are of two types: Special exceptions and standard exceptions. *Special exceptions* include easements, restrictive covenants, mineral estates, and other matters that usually transcend the transfer of ownership, that are attributable to instruments revealed by a search and examination of the title for the insured property. Special exceptions are, by definition, site specific and vary considerably by region. *Standard exceptions* are exceptions that the title insurer has designed to remove from coverage matters that affect the title but which are not attributable to instruments, liens or encumbrances found in the public land records. There are regional variations in standard exceptions. The exceptions, grammatically austere as they are, may appear unaccompanied by explanation, or they may be followed by a tutorial that expounds upon the meaning of the exceptions and explains what the title insurer will accept as a basis for removing the exceptions.

B. <u>Clearance</u>

Issuance of the commitment for title insurance will most likely result in a dialogue between the owner, the proposed insured or their respective counsel, and the title insurance provider over the commitment's requirements and exceptions. Communications between the parties and the title insurance provider tends to revolve around what they can agree will prove sufficient to remove the requirements and exceptions, or to afford affirmative coverage. If after these negotiations the title agent comprehends that the transaction as proposed entails enhanced risks to the title insurer, the title agent and title insurer offices may in turn carry on a discussion on any number of issues.

1. Extended coverage

   Title insurance is often characterized as providing either standard coverage or extended coverage. Standard coverage refers to the policy that insures against basic risks, including defects that are ascertainable from the public records, and risks of forgery, competency and capacity. Extended coverage refers to the policy that insures, in addition, against defects not ascertainable from the records, and that extend to rights or claims of parties in possession, unfiled mechanics' and materialmen's liens, and matters that would be disclosed by a complete and accurate survey. An extended coverage policy in its simplest form is one that does not contain any of the standard policy exceptions. However, not all of the standard exceptions will necessarily be removed. Each exception expresses a distinctly separate risk, criteria for the deletion which the title insurer will provide and which must be separately analyzed. In the event that the criteria are timely supplied, the title insurer may agree to remove the exception.

   a. Standard exceptions

      Although the language of standard policy exceptions may vary, they are substantially as follows:

      - Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land ("The Standard Survey Exception").

      - Easements or claims of easements not shown by the public land records.

      - Rights or claims of parties other than Insured in actual possession of any or all of the property.

      - Unfiled mechanics' or materialmen's liens. (Another version of this is exception that is commonly use is: "Any lien or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.")

- Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

b. The standard survey exception

i. When no plat of survey is provided

The policy exception least likely to be removed from the policy is the standard survey exception. Historically, the survey exception was: Unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose. Although title insurers have authorized the deletion of the survey exception from the ALTA loan policy when insuring mortgages involving residential property, they do not authorize the survey exception's deletion from the ALTA owner's policy unless a current land survey containing a satisfactory surveyor's certificate is provided for the title company's examination. Title offices, which lack the technical expertise of land surveyors of locating monuments in the field, typically refrain from conducting field inspections. Reluctance to remove the survey exception stems from the possibility that the title insurer could become obligated to pay for loss occasioned by the forced removal of the insured's buildings and improvements, if encroaching on a boundary line or easement.

ii. When a plat of survey is provided

Once it has received the land survey and request for related coverage, the title insurance agent proceeds to examine the survey for encroachments of buildings, fences, retaining walls, and roof overhangs, for building setback violations, and for road right of way encroachments by loading docks, underground vaults, sidewalks and other obstructions (Exhibit 10). On occasion, zoning information, and wetland or floodplain designations are revealed by the survey and will be listed as exceptions by the policy as a result. Finally, the title insurance agent will usually compare the location of any building, structure or parking lot with the location of utility easements in order to ascertain whether these encroach upon the easements.

iii. Importance of the surveyor's certificate

Title insurers regard the scope of the surveyor's certificate as important to their decision about whether the survey exception will be deleted. Survey certificate forms vary, and there is no single form deemed by the title insurance industry as a prerequisite to extending coverage over survey

matters. However, at a minimum, the surveyor should certify that he has examined the property for encroachments, that the survey depicts all buildings, structures, fences and improvements, and that the description represents a complete and accurate description of the land. Because they do not contain certificates of this kind, various land division plats or maps are not acceptable to title insurers as a basis upon which to delete the standard survey exception from the ALTA owner's policy.

iv. Affidavit of no change to improvements

Title insurers have indicated a willingness to delete the survey exception from the ALTA loan policy, when issued, to insure mortgages involving commercial property, without a current land survey, provided that a non-contemporaneous land survey of the same property is supplied for examination along with an affidavit by the landowner to the effect that nothing described in the non-contemporaneous land survey has changed (Exhibit 11).

v. What does the removal of the survey exception signify?

When the title insurer has in fact deleted the survey exception, it may not necessarily be clear what physical intrusions have been indemnified against as a result. Subsurface objects or intrusions of which the purchaser had no actual knowledge, such as septic drain fields, farm drain tile lines, gravesites, geological sites, building foundations or rock strata, when not occupied by any landowner under a claim of right, may nevertheless constitute physical features unequivocally detrimental to the interests of the insured owner. Abandoned wells, underground storage tanks or burial sites containing human remains may require the landowner to adhere to applicable federal and state laws and local ordinances regulating the site conditions and incur loss in connection with site remediation. However, do these physical conditions constitute a lien, defect or encumbrance of the kind against which coverage is provided by the title insurance policy? In Kayfirst Corp. v. Washington Terminal Co., 813 F. Supp. 67 (D.D.C. 1993), it was held that the buried foundation of a building constituted an encumbrance on the title of the insured, rendering the title unmarketable. It was held that the removal of the standard survey exception afforded coverage against annual fees assessed post-policy by the city against the insured owner for an encroachment by the insured of an underground parking structure within the right of way of an abutting city street. First American Title Ins. Co. v. Dahlmann, 2006 WI 65, 291 Wis. 2d 156, 715 N.W.2d 609 (2006).

vi. What does a modification of the survey exception signify?

In some instances, when a survey is provided to the title insurer, the survey exception may conceivably be revised rather than deleted in its entirety. When the title insurer, upon its receipt and review of a survey that ultimately proved erroneous by understating the amount of the land burdened by a flowage easement that prevented development of the land, revised the survey exception to state: "This policy does not insure against loss or damage ... that arise by reason of ... the following matters: ...2. *Shortages in area*… (the word "encroachments" was deleted from the survey exception)" the court adopted the insured's interpretation that "encroachments" in the standard survey exception included the flowage easement. If "encroachments" included the flowage easement, then removing "encroachments" from the standard survey exception meant that the flowage easement was no longer excepted from coverage. Lawyers Title Ins. Corp. v. Doubletree Partners, L.P., 739 F.3d 848, 856 (5th Cir.2014).

vii. Forced removal coverage

Some standard policy forms provide forced removal coverage. For example, Covered Risk 20 of the ALTA Homeowner's Policy (Rev. 12-02-13) insures against loss that results if: "You are forced to remove Your existing structures because they encroach onto Your neighbor's land." Where the adjoining owner threatens the removal of encroaching structures, what is the effect of a forced removal coverage policy where the standard survey exception was not deleted from the policy?

After title insurer issued an Expanded Protection Owner's Policy that contained coverage against certain risks ("12. You are forced to remove your existing structure-other than a boundary wall or fence-because: a. it extends on to adjoining land or on to any easement… (and) d. any portion of it was built without obtaining a building permit from the proper government office or agency."), the insured owner received a letter from the adjoining owner, the United States Forest Service, notifying the insured owner that the westerly portion of the insured's house, utility service box and propane tank encroached onto the U.S. Forest Service's land, and stating:

> We have previously provided you with a complete record of survey data and maps related to the area and the items in question. This letter serves as formal notice to remove all materials structures you

have located on National Forest System land. Specifically, perform the following:

- Remove from Federal property all improvements related to your home at 155 Norton Farm Road, Ripton, VT including a portion of your home, propane tank and any lines associated with such.
- Consult with the Rochester District Ranger and staff regarding the necessary site restoration needed to restore the site to a natural state which may include the removal or addition of fill, spreading of loam, grading, and plating of native seed mix or plants.

Please remove these items and complete restoration work by May 31, 2013. If you feel this timeframe is not adequate you may provide, for our review and approval, a detailed alternative schedule for the completion of this action. *If you have not completed this work by the above date we will proceed accordingly* (emphasis added).

The insured then brought suit against the title insurer claiming that the U.S. Forest Service letter triggered forced removal coverage under the policy. The court determined that the title insurer had no duty to defend or duty to indemnify under the policy until a forced removal was either imminent or has taken place, neither of which was the case. The insured did not remove the encroachments by the Forest Service's deadline or at any time thereafter, and the encroachments were neither been destroyed nor was their destruction imminent. To require courts, property owners, and insurance companies to parse every demand letter in order to discern whether a threatened removal is sufficiently serious to trigger coverage would invite coverage disputes where none exist, prompt property owners to file lawsuit when a forced removal may never actually take place, and embroil the courts in a virtually impossible task of separating serious and viable threats from mere posturing. The insured could have but did not negotiate the removal of the standard survey exception in the owner's policy. Johnston v. Connecticut Attorneys Title Ins. Co., No. 5:13-cv-229, U.S. Dist. 2014 WL 1494016 (D. Vt. April 16, 2014).

c. Easements not recorded

The inherent limitations upon relying upon a land survey to reveal easements which are either prescriptive or, though express, were not recorded, are illustrated by Hon, Inc. v. Central Missouri State Univ. Bd. of Regents, 678 S.W.2d 413 (Mo. App. 1984). The property was burdened by an unrecorded aviation easement used by aircraft that crossed over the insured property at a low altitude. The title insurer argued unsuccessfully that loss occasioned by the easement was non-compensable because the easement would have been disclosed by a land survey. The court ruled, however, that coverage against the easement was

provided under the policy. So that it is clear that there is no coverage against easements that would not be disclosed by a complete and accurate survey, title insurers have added another standard exception: *Easements or claims of easements not shown by the public land records*.

d. Easements or claims of easements not shown by the public land records

In some localities, not all public utility easements have been recorded. Since utility easements are often attributable to underground improvements, which are not visible at the site, title insurers do not authorize the deletion of the exception for easements or claims of easements unless they are first provided with a American Land Title Association – American Congress on Surveying & Mapping (ALTA-ACSM) survey which specifically certifies that the surveyor has reported all easements, including observable evidence of drains, telephone, telegraph, or electric lines: water, sewer, oil or gas pipelines on or across the property, and specifically including underground easements. The surveyor certifies to this assurance by way of Item 11(b), Table A of the 2005 ALTA-ACSM optional survey responsibilities and specifications. The title insurer does not investigate through what sources the land surveyor obtain information from which to generate this certification, only that it is in fact generated.

If no certification of the kind found in the ALTA-ASCM survey is provided, it may still be possible that the title insurance provider will entertain the deletion of the survey exception from the owner's policy, but only if it is provided with engineering information from the public utilities in sufficient detail from which it can in fact determine that the utilities do not operate any facilities or hold any unrecorded grant of easement that affects the insured land.

The disposal of potential utility easements based upon satisfactory survey or utility information leaves non-utility prescriptive easements as a remaining potential policy exception. Prescriptive easements may exist for various purposes, including footpaths, private roads, a shared well, drain tile lines, sewer service lines (Exhibit 12). The right to use these easements may or may not be apparent from an inspection of the site. Private roads or trails in recreational areas may be shared by users, the identity of whom may be impossible to ascertain, even from an inspection of the site. State laws accord those who make seasonal use of roads or paths the continued right to do so, even though the use thereof does not occur regularly throughout the calendar year. Widell v. Tollefson, 158 Wis. 2d 674, 462 N.W.2d 910 (1990). For those developers of residential subdivisions who seek to quiet the title to large tracts of rural land in order to extinguish the rights or claims of transient users, it may be extremely difficult to identify all of the necessary parties defendant based upon the sporadic or transient use of the land.

The removal of the standard exception for easements not of record may not necessarily result in coverage in favor of the insured owner as against loss

occasioned by the unrecorded easement. In the event that the insured had actual knowledge of the easement, coverage against loss may be excluded under Exclusion 3(a) of the policy. Thus, where the insured prior to closing saw posted signs warning of danger from bombing activity, a spotting tower and employees of the federal government walking on the premises, there was no coverage against loss occasioned by two unrecorded easements in favor of the United States on a portion of the insured land. Mann v. Old Republic Nat'l Title Ins. Co., 975 S.W.2d 347 (Tex. App.- Hous. 14 Dist. 1998)

e. Rights or claims of parties other than Insured in actual possession of any or all of the property

Title insurance providers do not ordinarily visit or view land they undertake to insure. Consequently, title insurance providers do not have a reliable first hand source of information from which to determine whether there are in possession of the land persons who derive an estate or interest in the land through periodic tenancy or by adverse possession. Tenants and neighboring landowners who have acquired portions of the insured premises by adverse possession nevertheless constitute persons having interests potentially inimical to that of the insured.

The practical means by which evidence of occupants has been elicited have been one or a combination of a current land survey or an owner's affidavit revealing the identity of persons in possession. Title insurers may differ concerning the evidence regarded as a prerequisite to deleting the exception for rights or claims of parties. In some locales, there is a custom and practice among title insurance providers of deleting the rights and claims of parties exception based solely upon an owner's affidavit which is supplied in blank using the title insurance provider's internal affidavit form. The prospective purchaser will need to inquire of the title insurance provider prior to closing what evidence the title insurer requires as a basis from which the exception can be deleted.

f. Other standard or quasi-standard policy exceptions

Title insurance providers in some localities raise exceptions for matters which may or may not exist, but which due to the increased risk of such matters warrant a higher degree of vigilance. Therefore, in some locales, title insurance providers raise a standard exception for mineral rights, even though the title insurance provider may not have specifically noted the instrument by which such rights were articulated. In many cases, mineral rights were created by operation of law.

Property fronting on water is usually conveyed by deeds containing a property description that encompasses land located below the ordinary high water mark of the lake or river, and which is therefore subject to the state's public trust doctrine. A failure to investigate the location of the ordinary high water mark, when new construction occurs, can have dire consequences for owners and title insurers that insure them when the structure is placed on the lakebed. State v. Trudeau, 139

Wis. 2d 91, 408 N.W.2d 337 (1987). Accordingly, title insurers usually require that an exception be raised for such rights, and resist its deletion from the policy.

2. Identity, capacity and authority

As transactions vary, so does Schedule B-1: A sale will necessitate a deed, and a financing a mortgage or deed of trust, hence appropriate requirements will vary on the basis of how much detail the title insurance provider is given about the impending transaction. Schedule B-1 may also contain secondary and tertiary requirements: A conveyance by an individual may be accompanied by a requirement that the individual's spouse, if any, join in the conveyance. A conveyance by an entity, such as a corporation, may be accompanies by a requirement that a resolution authorizing the conveyance shall be provided (Exhibit 13). A conveyance by the estate of a decedent, estate in bankruptcy, receiver, trust, general partnership, government entity, and any number of disparate owners, may conceivably be paired with a requirement refined to direct what additional documentation the title insurer requires in evaluating the insurability of the interest of the grantee of the conveyance instrument to be recorded.

3. Real estate taxes

Title insurance does not necessarily insure against taxes and assessments levied by the municipality or town during the past calendar year. However, the title insurance provider may upon receipt from the municipality or town contemporaneous with the closing a written confirmation that no special assessments have been levied as of the date of the closing, and may agree to delete the standard exception for special taxes or assessments from the owner's policy when such written confirmation is provided.

4. Judgments

Any number of judgments, statutory liens, taxes and assessments may be revealed by a search of the title and thus, shown as such by the commitment for title insurance. So that its insured will not be exposed to loss or damage and its title is not unmarketable, the title insurer will likely reveal all liens it regards as enforceable or potentially enforceable. However, the failure to release unsatisfied mortgages, judgments and liens will not invalidate the conveyance. In the event that satisfactions or releases of the lien are not placed of record in the appropriate place, the title insurer may conceivably issue the policy, but nevertheless retain exceptions for the unreleased matters.

Collections agencies are well aware of the effective medium that title and closing offices occasionally provide them in collecting debts that are secured by judgments and statutory liens, when the debtor is a property owner: When the title is searched, such lien claims come to light, and the prospective insured thus can be expected to require that payment necessary to elicit a release or satisfaction is forthcoming. Yet,

the title insurer owes no obligation to the mortgagee, lien claimant or taxing authority to collect on their behalf amounts as may be secured by such matters. Similarly, the title agent owes no fiduciary duty to the judgment debtor who places a request for title insurance, to insure against the judgment lien, and the title agent is completely justified in refusing to insure against the judgment lien even though it was later held that the judgment lien was invalid as a result of bankruptcy. Gildea v. Guardian Title Co., 970 P.2d 1265 (Utah 1998) It is possible that the lien will, since filing, have become unenforceable on the basis of applicable statute barring enforcement, or that the lien is defective in that it lacks the necessary elements under applicable law. The lien may impair the landowner's exemption under applicable state or federal law, and thus be subject to remedies available to discharge or satisfy the lien. Finally, the title insurance provider may, under appropriate circumstances, agree to accept an indemnification from the grantor, a bond from a surety, or an escrow deposit that protects it in the event of an action brought to enforce the lien claim against its insured.

Indemnification and escrow may prove appealing to the title insurer under appropriate circumstances. Judgment liens, tax liens and statutory liens invariably expire or become barred with the passage of time, and the existence of the lien does not necessarily mean that it is inevitable that the lien will be enforced against the real estate of the debtor. Thus, it is always possible that the title insurer will not agree to authorize the issuance of a policy though a comprehensive indemnification or fully funded escrow is offered it. However, certain factors serve either to encourage or deter escrows and indemnifications, including the lien's anticipated duration, size, the debtor's financial viability, and the creditor's anticipated enforcement. For example, in the event that an action to enforce a lien has been commenced and the divestiture of the debtor nearing conclusion, the title insurer will be hesitant to insure the interest of a successor for fear that the requisite payment or successful defense of the enforcement may not occur, or that the administrative cost to the insurer of monitoring the proceedings does not justify the title premium.

5. Mechanics' lien claims, statutory liens

The availability of coverage against statutory liens for services, labor or materials arising from an improvement or work related to the land, or "unfiled mechanics' and materialmen's liens," will depend in large part upon the laws of the jurisdiction where the land is located. Do the laws of the jurisdiction elevate the priority of mortgage lenders over unfiled mechanics' liens? In the event that the laws accord mortgagee's priority, the title insurer may ultimately agree to insure, though construction is ongoing, the priority of the mortgage, though suppliers and contractors enjoy the right to file lien claims that relate back to a pre-policy date event. In the event that the laws of the jurisdiction do not accord priority to mortgagees, then the title insurer may under appropriate circumstances, agree to provide the mortgagee with coverage, but require suitable lien waivers or subordination of lien rights from all contractors and suppliers, and indemnification from the general contractor and owner.

There are other types of liens in addition to mechanics' liens that are incapable of discovery from a search of the public land records. For example, the lien of unpaid federal estate tax is a lien against the property of a decedent and his successor though not filed in any public land record office. Title insurance providers may, in states that provide for statutory liens not discoverable from the public land records, elect to raise a standard exception in all or some commitments, so that coverage is not provided.

6. Mortgages

The statutes of some states require that having been paid in full the mortgagee shall within a period of days issue a satisfaction of mortgage or face civil penalties for noncompliance. The regulators of some states also investigate lenders subject to state regulation that fail to satisfy. Nonetheless, in residential mortgage finance, many mortgage loans that were paid remain unsatisfied as the result of the discontinuation of business of, bankruptcy by or indifference of loan servicers. In such instances, the seller or party seeking to obtaining financing is beset with a title that is likely to be considered unmarketable unless the title insurer is provided with (1) unequivocal proof of payment, (2) a letter of indemnity by a title insurer that was obligated as a part of a closing service to obtain a release of the mortgage, or (3) assurance by the loan servicer that the satisfaction is forthcoming. In some states, the closing agent that paid the loan is authorized by statute to sign and record a certificate of discharge of the mortgage. In yet other states, title insurers have entered into mutual indemnification agreements or "treaties" that where certain conditions are met, enable them to remove the unsatisfied mortgage by shifting the risk to the title insurer that disbursed the payment of the loan. As a practical matter, letters of indemnity in large numbers appear to be the predominant means of enabling the title insurer to remove the unsatisfied mortgage from its commitment. The most effective course of action for counsel for the parties is to ascertain local prevailing practice and allow for sufficient time to provide the title insurer what is required to remove the unsatisfied mortgage prior to the scheduled closing.

An entirely different situation is presented where there is no proof whatsoever that the loan secured by the mortgage was ever paid and the lender is an entity dissolved or an individual who is deceased or has disappeared. Statute laws may provide the court with jurisdiction to determine the validity of the mortgage or issue an order satisfying the mortgage. In some instances, the title insurer may depending upon the facts and circumstances agree to accept an indemnification or escrow of funds pending passage of what it regards as the time within which the mortgage is enforceable.

7. Bankruptcy and pending litigation

The pendency of a bankruptcy proceeding involving as a debtor the land's owner will result in a requirement to the effect that an order of the bankruptcy court be provided by which the proposed conveyance is authorized or directed by the court. The requirement will be raised when the title insure learns that a bankruptcy proceeding is pending, as occurs when the bankruptcy trustee records a notice of the filing in the

public land records (Exhibit 14). It is unlikely that in the absence of an order of the court or confirmation by the bankruptcy trustee and passage of the time within which to object that the property constitutes the exempt property of the debtor, the title insurer knowing that bankruptcy is pending and no order for discharge entered would agree to insure the proposed purchaser. The bankruptcy court order must be unequivocal in describing the real property, confirming that the title of the debtor shall pass by virtue of a conveyance, the name of the party that shall execute and deliver the conveyance, and whether the conveyance is free and clear of liens. The title insurer will require that the requisite notice of motion for the order was given to all parties, and that the time to appeal the order has passed. In the event that the bankruptcy court order authorized the mortgagee to foreclose, the title insurer will not assume that the order also authorizes the debtor to execute and deliver a deed in lieu of foreclosure (Exhibit 15). In the event that the bankruptcy is a Chapter 13 proceeding, a question arises whether the order confirming plan is in and of itself sufficient to vest the title in the debtor with authority to convey without further authorization by the trustee or the court. Generally, the title insurer will require in addition to approval of the plan the consent of the bankruptcy trustee as a condition of insuring the proposed grantee.

Litigation involving certain causes of action has the potential to affect the title of a party to the action, including foreclosure, divorce, partition, quiet title, rescission, specific performance and declaratory judgment actions. When litigation contesting or asserting ownership is pending, a transfer of the title by the owner or contestants is unlikely to occur unless the action is dismissed and the lis pendens discharged by the court. When an action has been dismissed or a judgment entered, an appeal or the possibility of an appeal is similarly a deterrent to the transaction's closing. Title insurers will strive to assure that an order for dismissal is entered and the right of appeal has passed, before providing title insurance to a prospective purchaser. Generally, title insurers do not insure titles that are the subject of litigation, for to do so would be to handicap the likelihood of a party prevailing by projecting the type of title insurance premium appropriate to the risk of a favorable outcome.

8. Easements, covenants and restrictions

Easements that encumber or burden real property vary with respect to the invasiveness of the rights they entail. For example, an easement used for the transmission of natural gas in one or more underground pipelines bisecting the tract may reduce or eliminate the site from consideration for planned construction, but an easement for the shared use of an abandoned well on its periphery may not. Similarly, the easement having been granted a many years ago may have become unused or abandoned, and if there is no dominant estate that can be ascertained, the location of the easement holder impossible to determine. Rather than secure a release of easements that appear of no practical consequence, it is possible that the title insurer may where appropriate provide affirmative coverage as against the easement's enforcement.

A recurring issue is whether the express easement that grants rights in a surface area, only a portion of which is used or occupied for the purpose intended, continues after usage commences to encumber the unused portion of the land, such that the easement's user may enjoin removal of improvements placed by the landowner. The issue occurs in the context of utility easements that were granted, based upon the instrument's description, across large tracts of land, the actual installation of power lines and overhead wires or underground cables for which involved relatively narrow strips of the land described in the easement. Title insurers may, under appropriate circumstances, agree to provide certain affirmative coverage as against the future enforcement of such easements in the land not used or affected by installation of utility improvements.

The recordation of restrictive covenants that interfere with the intended use and enjoyment of the real estate to be acquired may result in a discussion over whether the land can be developed notwithstanding the restriction's recordation. The title insurer will likely list the restrictive covenant as an exception unless time-barred by applicable statute or unless it determines that all parties having a right to enforce the covenant have released or terminated the covenant of record. In yet other instances, although it is difficult to generalize, the title insurer may conceivably be willing to provide affirmative coverage against the recorded restrictive covenant depending upon its ability to establish various factors:

- There is wide scale violation of the same restrictive covenant on other parcels in the vicinity (Exhibit 16).
- Enforcement of the restrictive covenant would violate federal, state or local law (Exhibit 17).
- The violation of the covenant that will be caused by the proposed construction is of a minor nature.
- The covenant is vague and indefinite
- The use of property benefitted by the covenant has changed (Exhibit 18)
- The covenant is unenforceable as the result of lack of execution by the proper parties.

Availability of coverage is fact specific and requires careful analysis by the title insurer.