The Commitment for Title Insurance: *How to Review*

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The Commitment for Title Insurance: How to Review

1. What is 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, 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 make arrangements or begin negotiations with the appropriate parties for their payment or release.

2. Component parts of the commitment

The ALTA promulgates commitment forms. In June, 2006, ALTA promulgated two alternative commitment forms, the standard Commitment form and the ALTA Plain Language Commitment form. Both promulgated 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. 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 schedules (e.g. "Schedule C"), 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 he possesses 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.

3. Schedule A

Schedule A of the commitment consists of the following:

a. The Commitment Date

The Commitment Date, formerly the "Effective Date", is the date through which the title has been searched and examined by the title company staff. The Commitment 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 quality 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 older the Commitment Date, the greater the risk to the insured. Note: As of August 1, 2016, the ALTA promulgated a new Commitment for Title Insurance which replaced "Effective Date" with "Commitment Date."

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, 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, 4th ed. (2001) §1.10(c)(2), 21. 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 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.

4. Schedule B - Section 1

a. Instrument creating the estate or interest to be insured

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:'"

b. Due diligence: 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. 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.

c. Mortgages, liens and taxes

Unless they are listed in Schedule B – Section 2 as exceptions, Schedule B-1 will reveal and require the satisfaction or release of mortgages and liens and payment of taxes, which will be described specifically, as by identifying the recording document number, court case number, or creditor, where applicable. It is in this, the enumeration of liens, that those unfamiliar with title insurance may be tempted to observe that the commitment displays matters that are inappropriate, irrelevant or unnecessary. For example, the commitment may reveal a requirement (or exception) for a judgment against a name that is the same or similar to the name of the owner; the title insurer may not know whether the judgment is a valid lien. Similarly, the commitment may reveal a deed purporting to convey by a stranger to the transaction, or an affidavit asserting an interest in the real estate that appears not credible. After having searched and examined the title, title insurance providers tend to reveal all that they have found from which an inference of liens, defects or encumbrances can be drawn. The ALTA Owner's Policy and Loan Policy insure against loss or damage by reason of unmarketable title. Such matters are revealed because they have the potential of impairing the marketability of the title. "A title is marketable only if there is a reasonable certainty that it will not be called into question, so as to subject the purchaser to the hazard of litigation." Javna v. D. J. Fredricks, Inc., 41 N.J. Super. 353, 357, 125 A.2d 227, 229 (1956). "The marketability of a title turns not only on what interest can be successfully asserted as against a prospective buyer, but also on what a prudent buyer might reasonably though erroneously apprehend to be the resolution of a doubtful question affecting the title." Target Stores v. Twin Plaza, 277 Minn. 481, 153 N.W.2d 832, 843 (1967).

In reporting liens, defects and encumbrances, the commitment will thus be in a sense equivocal on the question of the item's ultimate validity. The commitment does not, by reporting such matters, certify that the items constitute interests or liens that are in fact enforceable and must be paid; on the contrary, the commitment indicates that they are simply matters against which the title insurer is, for the moment, unwilling to insure. Unless the matters are disposed of to the title insurer's satisfaction, the items will remain exceptions in the policy. Ultimately, the title insurer may agree to delete the item on the basis of affidavit, indemnity, or information that establishes that the matter does not affect or impair the title. Custom and practice may allow for a conventional way of handling the removal of spurious claims, defective liens, or judgments against common names. However, the proposed insured should never assume, regardless of custom and practice, that the matter will be removed by the title insurer on the basis of documentation that the proposed insured subjectively believes will be satisfactory: The title insurer reserves the unilateral right to retain or delete the matter by appropriate endorsement, and thus the insurance provider should be requested to delete the item before, not after, the consummation of the closing.

d. "Below the line" notes and information

Finally, Schedule B-1 may, depending upon the locality, issuer, and custom and practice, out of convenience or necessity refer or allude to any of an array of matters perceived as pertinent to conveyances or financing practicalities, including local recording requirements, recording fees, regulations and ordinances relating to property transfers or land divisions, building codes, occupancy permits, future assessments contemplated but not levied, historic preservation, highway access regulations, sanitation, water quality, environmental laws and regulations, the Foreign Investment in Real Property Tax Act (FIRPTA) (26 U.S.C. §1445), Privacy Act (15 U.S.C. §§6801-6809), and Department of the Treasury, Office of Foreign Assets Control regulations dealing with the implementation of the USA PATRIOT Act. Historically, title insurance providers took measures to distinguish such non-requirement information from requirements by physically separating the two by a horizontal line, hence the term, "below the line notes." Such information, intended to relate to uninsured matters, is not of the type that will ordinarily appear in the policy when issued.

5. Schedule B – Section 2

a. Exceptions

Schedule B – Section 2 of the commitment ("Schedule B-2") contains *exceptions* that will appear in the policy, provided the requirements are complied with. Though both limit or remove coverage, exceptions are distinguishable from exclusions, which will appear elsewhere in the policy: *Exclusions* are direct limitations on coverage that exclude certain matters the policy was never designed to cover, such the insured's own acts or unenforceability of the mortgage caused by usury or failure to comply with truth in lending laws. *Exceptions* are matters for which coverage is not given though the policy would ordinarily insure and indemnify against a loss arising from the matter excepted. "Title insurance policies contain Exclusions from Coverage which limit the coverage clauses to make it clear that there is no coverage for matters that are, by their nature, outside of the scope of a title insurance policy. In general, these exclusions relate to matters that cannot be insured against on other than a pure casualty basis…", Raymond J. Werner, <u>The Basics of Title Insurance in Title Insurance: The Lawyer's Expanding Role</u> 19 (James M. Pedowitz ed. 1985).

b. Standard exception: Unfiled mechanics' and materialmen's liens

Perhaps the quintessential risk appropriate to a standard exception is that of unfiled mechanics' and materialmen's liens, or as they are known in some states, unfiled construction liens. These are liens that, due to their inchoate nature and their undetectable status regardless of an exhaustive search of the public records, pose a risk to purchasers and lenders incapable of exact measurement or quantification without resort to an investigation and indemnification process that is subjective to the transaction. Though title insurers contemplate that such risks may indeed come to be covered under the appropriate circumstances, at the point in time that the commitment is ordinarily issued, an investigation of the appropriate circumstances will not yet have been commenced, hence the need for the standard exception.

c. Negotiable

The commitment for title insurance is, in contrast to the policy, a work in progress, and its 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.

d. Two types of 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.

6. Conditions

In addition to requirements and exceptions, the commitment for title insurance contains conditions. The conditions incorporate by reference the Conditions and Exclusions of the policy form committed to be issued: In the event the proposed insured is unfamiliar with the policy form, it should immediately seek and obtain it for review, for these are the provisions to which the commitment refers. Also, in the event that the proposed insured has knowledge of any defects or liens other than those shown in Schedule B and does not disclose such knowledge to the company, the company will not be liable for loss resulting from such failure to disclose. The company is liable for actual loss only to the named insured, and for loss that the insured incurred in relying upon the commitment, provided the loss arises from the insured's attempt to comply with the requirements or the insured's expense in eliminating exceptions or to acquire or create the estate or interest or mortgage covered by the commitment.

B. Clearing Exceptions and Requirements: How to Negotiate

Issuance of the commitment for title insurance will 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. Negotiating the removal of special exceptions will be discussed in the following section, "Resolving Common Title

Problems." Negotiating the removal of standard exceptions will be discussed in Section IIIA., "ALTA Extended Coverage vs. Standard Coverage."