

A close-up, slightly blurred photograph of a person's hands working at a wooden desk. The person is holding a pen over a document. In the background, there is a calculator, a cup, and several colorful sticky notes.

The Title Policy: Underwriting Standards

Prepared by:
Duane H. Wunsch
Fidelity National Title Group, Inc.

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I. THE TITLE POLICY

A. Underwriting Standards: Owner's Policy vs. Loan Policy

Title insurers have often extended wide latitude to their agencies to modify or delete the policy exceptions from loan policies that insure residential lenders, in that such actions under appropriate circumstances pose minimal exposure to the title insurer. In contrast to residential loan policies, removal of exceptions from owner's policies usually requires closer scrutiny of the associated risks. The reason: The discovery of a title defect triggers an immediate obligation to indemnify under the owner's policy, but no such obligation exists under the loan policy.

Defining and measuring actual loss under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower's title. The fee interest of an owner is immediately diminished by presence of lien since resale value will always reflect the cost of removing the lien. A mortgagee's loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate. Green v. Evesham Corp., 179 N.J. Super. 105, 109, 430 A.2d 944, 946 (1981). For a mortgagee, title insurance undertakes to indemnify against loss or damage sustained by reason of defects or title or liens upon the land, but does not guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid. Demopoulos v. Title Ins. Co., 61 N.M. 254, 255, 298 P.2d 938, 939 (1956); Couch on Insurance, §57:189, 205 (2d ed., 1983 & 1986 supp.).

Blackhawk Prod. Credit v. Chicago Title Ins. Co., 144 Wis. 2d 68, 423 N.W.2d 523, 525 (1986).

Lien and lien claims against real property may, depending upon the jurisdiction, typically include a wide array of statutory, tax and judgment liens, which are subject to defenses and the enforceability of which may therefore prove implausible, unlikely or impossible. What event triggers the title insurer's obligation to pay, secure a release of, or settle, a lien or would be lien, for which no policy exception was raised: Filing, threatened enforcement, or a decision of a court of last resort decreeing that the non-expected lien claim is in fact valid? The filing of a non-expected lien or lien claim does not in and of itself necessarily obligate payment, for a unilateral filing in the public land records does not mean that the lien is necessarily valid or enforceable. Thus, where the title insurer neglected to raise exceptions for six mechanics liens, the title insurer was obligated to pay for the cost of removing the mechanics liens, but because three of the liens proved invalid, the loss was not based upon the face amount of the six mechanics liens. MacDonald v. Lawyers Title Ins. Corp., 1996 U.S. App. LEXIS 4505 (4th Cir. 1996).

The mere existence, indisputable as it may be, of a title defect, lien or encumbrance does not trigger an immediate obligation of the title insurer to pay the insured mortgagee. In most cases, the mortgagee's loss cannot possibly be established until the confirmation at

sheriff's sale fixes both the value of the mortgagee's security interest and the value of the property obtained at the foreclosure. See Karl v. Commonwealth Land Title Ins. Co., 20 Cal. App. 4th 972, 24th Cal. Rptr. 2d 912 (1993), aff'd, 70 Cal. Rptr.2d 374 (1997).

The loan policy continues in force in favor of an insured lender that acquires the property by foreclosure or a conveyance in lieu of foreclosure, but the coverage is that in effect as of the date of issuance of the policy. The loan policy does not, upon the mortgagee's purchase at sheriff's sale, "convert" to an owner's policy with its loss measuring methodology, but requires an analysis of the lender's recoupment of principal and interest at point of sheriff's sale. CMEI, Inc. v. American Title Ins. Co., 447 So. 2d 427, 428 (Fla. Dist. Ct. App. 1984). In the event that the loan policy did not raise an exception for a lien paramount to the lien of the insured mortgage, and the judgment creditor, after the mortgagee acquired title by foreclosure of its mortgage, demanded payment from the insured mortgagee, the title insurer was obligated to pay the judgment lien and cannot deny coverage solely on the basis of the absence of a judgment of the court determining that the judgment in question constituted a valid lien. Bluff Ventures Ltd. P'ship v. Chicago Title Ins. Co., 950 F.2d 139 (4th Cir. 1991).

As a result of the important distinction between loan policy and owner's policy with regard to timing of a loss, title insurers are more willing to extend to lenders coverage against matters described in the policy exceptions.

B. Alternative Policy Forms Development

The title insurance policy form or forms that are available to the insured will vary by state and title insurance provider. In most states, ALTA policies are available, and unless noted otherwise, this discussion is premised on ALTA policies.

1. The American Land Title Association (ALTA)

Although there is essentially only one form of commitment for title insurance, there are a number of different policy forms that have been introduced by land title associations and individual title insurers. The American Land Title Association has promulgated title insurance policy forms since 1946. The ALTA owner's policies and loan policies are widely regarded as standard forms. The ALTA revised the standard policy forms in 1970, 1987, 1990, 1992 and 2006. Although it may be possible by special request, as a practical matter to obtain ALTA's pre-2006 policy forms, title insurers usually issue the latest forms, which at the date of this writing are the ALTA Owner's Policy (6-17-06) (See Exhibit H) and ALTA Loan Policy (6-17-06) (See Exhibit I). ALTA has also introduced policy forms that are specifically designed for residential property. In addition to policy forms, ALTA has promulgated a number of standard loan policy and owner's policy endorsements, which are revised periodically.

2. The California Land Title Association (CLTA)

The California Land Title Association (CLTA) has also promulgated policy forms, the issuance of which is confined to western states, but is better known outside California for a multitude of policy endorsement forms, which are issued nationwide.

3. Proprietary policy forms

Individual title insurers have recently developed and promoted the use of their own non-ALTA policy forms in certain states. Title insurers periodically design and issue at the request of individual customers, stylized endorsements which afford coverage lacking in the policy, or imparting affirmative coverage against a specifically identified matter

4. The commercial market: Endorsements options

Residential purchasers and lenders often have a choice of policy forms, and coverage imparted by policy boilerplate varies considerably. In residential transactions, policy forms variations are due largely to marketing efforts of title insurers that have been addressed to broad constituencies, including mortgage lenders and consumers. However, in commercial transactions, except in some states for the choice of year (1970, 1987, 1990, 1992 or 2006) there is no variation concerning the choice of policy form, due to wide acceptance of the standard ALTA policies, but a significantly greater selection of endorsements that the commercial property purchaser and lender may ultimately obtain that modify the policy Conditions and the policy Exclusions. The prevalence of endorsements in commercial transactions is a reflection on the pre-closing negotiations that take place between counsel and title insurer over various issues, an exercise that, depending upon the locale, is largely absent from residential real estate transactions.

5. Policy and endorsement form revisions

Paragraph 2 of Schedule A of the commitment identifies or should identify the name of the policy form to which the title insurer commits to issue upon fulfillment of the requirements. In the event there is any uncertainty over which policy form is to be issued, the choice of form can be confirmed by an endorsement to the commitment.

6. Residential loan policy forms proliferation

In most states, title insurers are required to file their policy forms and secure state regulatory approval before issuing the policy. Although title insurers are authorized to issue the ALTA Loan Policy (6-17-06) in most states, some have also filed innovative ALTA loan policy forms. These policies have been designed for residential one-to-four family property, though the title insurer may conceivably agree to issue them for other property as well:

a. ALTA Short Form Residential Loan Policy

The Short Form Residential Loan Policy (12-3-12) (See Exhibit J) contains twenty-one insuring provisions, as compared with the ALTA Loan Policy, which contains fourteen. The Short Form Residential Loan Policy departs from the ALTA Loan Policy format by incorporating insuring provisions in both the Covered Risks section of the policy, as well as in Schedule B, which is entitled “Exceptions from Coverage and Affirmative Insurances.” The Short Form Loan Policy’s insuring provisions are also more expansive than those in the ALTA Loan Policy, including assurances against the violation of covenants and restrictions, and against encroachments upon easements. The same coverage is found in and can be obtained by way of combining ALTA Endorsement Forms 9 (Restrictions, Encroachments, Minerals) with the ALTA Loan Policy. Any combination of fifteen additional endorsements to the Short Form Policy can be obtained by the insurer’s checking a box on the policy’s Schedule A, whereupon the endorsements are incorporated by reference.

b. ALTA Expanded Coverage Residential Loan Policy

The ALTA Expanded Coverage Residential Loan Policy – Assessments Priority (04-02-15) and the ALTA Expanded Coverage Residential Loan Policy – Current Violations both contain twenty-eight Covered Risks and also incorporate by reference certain ALTA Endorsements. Among the Covered Risks that were introduced by the ALTA Expanded Coverage Residential Loan Policy is a provision that, in recognition of lenders’ concerns over mortgage impairment scams, insures the lender against loss by reason of “[f]orgery after Date of Policy of (a) any instrument purporting to subordinate, assign, release or reconvey the Insured Mortgage...”

c. ALTA Short Form Expanded Coverage Residential Loan Policy – Current Assessments (04-02-15) and ALTA Short Form Expanded Coverage Residential Loan Policy – Current Violations (04-02-15)

Like the ALTA Short Form Residential Loan Policies, the ALTA Short Form Expanded Coverage Residential Loan Policy – Current Assessments (04-02-15) and ALTA Short Form Residential Loan Policy – Current Violations (04-02-15) incorporate by reference the Covered Risks section and Schedule B.

d. ALTA Residential Limited Coverage Junior Loan Policy (08-01-12)

The Residential Limited Coverage Junior Loan Policy (08-01-12) bears a closer resemblance to the title insurance commitment than to the ALTA Loan Policy. It is issued before, not after, the closing, and does not insure the validity of the lender’s mortgage. The Junior Loan Policy instead insures against loss or damage sustained by the Insured by reason of:

- The Grantee not being the named grantee on the last document purporting to vest the Title recorded in the Public Records.
 - The description of the Land in Schedule A not being the same as that contained in the last document purporting to vest the Title recorded in the Public Records.
 - A Monetary Lien recorded in the Public Records.
 - Any ad valorem taxes or assessments of any governmental taxing authority that constitute a lien on the Title and that on Date of Policy appear in the official ad valorem tax records where the Land is located.
- e. ALTA Short Form Residential Limited Coverage Junior Loan Policy (4-2-13)

Like the ALTA Short Form Residential Loan Policy and the ALTA Short Form Expanded Coverage Residential Loan Policy (7-26-10), the ALTA Short Form Residential Limited Coverage Junior Loan Policy (4-2-13) incorporates by reference the terms of the full length policy, in this case, the terms, Exclusions from Coverage and Conditions of the Residential Limited Coverage Junior Loan Policy (08-1-12).

The multitude of new loan policy forms that have become available for residential property, and that display coverage more expansive than the prevailing ALTA Loan Policy beg the question: Do the title insurers that issue these policy forms engage in underwriting (search and examination) measures which are different from those followed in issuing the standard ALTA Loan Policy? For example, do the title insurers procure additional information pertaining to the possible existence of encroachments so that they can in turn assure the lender that these encroachments do not in fact exist?

Though the shorter form loan policies may commend themselves, principally due to the policy form's brevity and speed of issuance, to residential lenders, commercial lenders typically require the standard 2006 ALTA Loan Policy.

7. Residential owner's policies

One owner's policy form designed for residential property, the ALTA Homeowner's Policy (12/02/13), is currently available. The ALTA decertified an earlier residential form, the ALTA Residential Title Insurance Policy (One-to-Four Family Residences) (6/01/87), on August 1, 2013.

In contrast to the 2006 ALTA Owner's Policy, which has ten Covered Risks, the ALTA Homeowner's Policy contains thirty-two different Covered Risks, some of which approach expansive coverage that, until the Homeowner's Policy was introduced, was either unavailable altogether or afforded only by endorsements. For

example, Covered Risk 23 provides coverage to the insured (“You”) against loss occasioned by encroachments if:

You are forced to remove Your existing structures which encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.

Covered Risks 19 and 20, respectively, provide certain zoning coverage by insuring against loss when:

You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.

The ALTA Homeowner’s Policy is not available in all states, and in states where it is available the criteria that title insurers follow when underwriting the policy may differ significantly from that used when underwriting the 2006 ALTA Owner’s Policy.

8. Commercial title policy forms

Although the title industry continues to develop residential policy forms, a commercial policy as such has never been developed. Therefore, the ALTA standard Owners Policy and Loan Policy continue to be the only ALTA form available for commercial property.

However, the ALTA has developed a leasehold policy with commercial property in mind. The ALTA first promulgated a leasehold owner’s policy and leasehold loan policy in 1975. In 2001 ALTA withdrew the leasehold policy forms and replaced them with newly promulgated endorsements. By issuance with the standard ALTA policies, the leasehold endorsements afford coverage to the leasehold estate holder. The leasehold endorsement available for mortgagees is the ALTA Leasehold Endorsement Form 13.1.

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