



The 1992 and 2006 ALTA Policy Forms: Significant Differences

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

LORMAN[®]

Published on www.lorman.com - April 2021

The 1992 and 2006 ALTA Policy Forms: Significant Differences, ©2021 Lorman Education Services. All Rights Reserved.

LORMAN[®]

Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

The 1992 and 2006 ALTA Policy Forms: **Significant Differences**

Effective June 17, 2006, the ALTA promulgated new policies and endorsements. Intending the new policies to ultimately replace the older policies, the ALTA then decertified the older policy forms. Effective June 17, 2007, the 1992 ALTA Owner's Policy and Loan Policy forms are no longer official ALTA forms. The ALTA's comment about the older forms that accompanied their decertification: "These forms will continue to be listed because the prior language continues to exist and individual insurers have these forms in the marketplace. In addition, customers may request or regulatory approval may mandate the use of some of these forms." Thus, whether the 2006 ALTA policies, or alternatively, the 1992 ALTA policies are in fact available in connection with the anticipated real estate transaction requires a state by state, insurer by insurer, inquiry.

The 2006 ALTA Owner's Policy and Loan Policy introduced several important changes.

1. Any defect in or lien or encumbrance on the title

The 2006 ALTA policies introduced Covered Risk 2(a), which elaborates upon the scope of the 1992 ALTA policies second insuring provision ("Any defect in or lien or encumbrance on the title"), stating that this covered risk includes but is not limited to insurance against loss from a defect in the title caused by

forgery, fraud, undue influence, duress, incompetency, incapacity and others.

2. Any encroachment, encumbrance, violation, variation that would be disclosed by survey

The 2006 ALTA policies introduced Covered Risk 2(c), which provides coverage against any encroachment, encumbrance, violation, variation or adverse circumstance affecting the title that would be disclosed by an accurate and complete land survey. The term "encroachment" includes both encroachments of existing improvements onto adjoining land, and encroachments onto the insured land of existing improvements located on adjoining land.

3. Creditors' rights

The 2006 ALTA policies provide affirmative coverage against two creditors' rights risks. Covered Risk 9 of the 2006 Owner's Policy and Covered Risk 13 of the 2006 Loan Policy provide coverage against loss or damage as the result of:

- a. A prior transfer, that is, prior to the transfer vesting title (and the insured mortgage in the loan policy) as shown in Schedule A constituting a fraudulent or preferential transfer.
- b. The present transfer, that is, the instrument of transfer vesting title (and the insured mortgage in the loan policy) as shown in Schedule A constituting a preferential transfer by reason of the failure of its recording to be timely, or to

impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

However, the 2006 ALTA policies do not provide coverage against loss or damage from any claim that the transaction *creating the insured interest* is a fraudulent or preferential transfer.

Example:

- August 1, 2018: Fossil Fuel Co., incorporated 1944, is acquired in a leveraged buy-out. As a part of the transaction, Fossil conveys the title to its flagship generating plant to its subsidiary, Ethanol Co., which obtains financing (secured by a mortgage) from EZ-Banco.
- September 1, 2018: Ethanol Co. conveys title to the generating plant to its affiliate Wind Energy Co., which obtains financing (secured by a mortgage promptly recorded) from Due Diligence Bank.
- January 4, 2019: Wind Energy files for bankruptcy.
- February 1, 2019: Ethanol Co. files for bankruptcy. Bankruptcy trustees bring adversary proceedings to avoid Due Diligence Bank's mortgage as a preference under §547(b) of Bankruptcy Code and Fossil Fuel's deed to Ethanol Co., and Ethanol's deed to Wind Energy as fraudulent transfers under §548(a) of the Bankruptcy Code.
- Due Diligence Bank obtained a 2006 ALTA Loan Policy insuring its mortgage. Is the title insurer obligated to defend Due Diligence Bank from the bankruptcy trustees'?

adversary proceedings and pay loss if the mortgage is determined to be invalid?

In this example, the title insurer is likely obligated to defend Due Diligence Bank from the adversary proceeding brought to set aside the deeds, because the adversary proceeding in effect challenges the validity of the mortgage on the basis that the deeds, which are "prior transfers" within the meaning of Covered Risk 13(a) of the Loan Policy, were fraudulent transfers under federal bankruptcy law. However, the title insurer is not obligated to defend Due Diligence Bank from the adversary proceeding brought to set aside its mortgage as a preference under §547(b), because the mortgage arose from "the transaction creating the lien of the Insured Mortgage" within the meaning of Exclusion 6 of the Loan Policy.

4. Exclusions for environmental, police power, condemnation, and creditors' rights "notice" revised

Exclusion 1(a) of the 1992 ALTA policies excluded coverage for laws, ordinances or governmental regulations restricting various occupancy, land division, and environmental protection, and governmental police power, but couched the exclusion in terms of whether a notice of a violation existed in the public land records. Thus, the policy excluded coverage for these matters, "...except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

The 2006 Owners Policy and Loan Policy replaced the above cited provision with: "...if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, *but only to the extent of the violation or enforcement referred to in that notice* (emphasis added)."

5. Exclusion 6 of 1992 Loan Policy deleted

Exclusion 6 of the 1992 Loan Policy excluded loss or damage for any statutory lien for services, labor or materials arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by the proceeds of the indebtedness secured by the insured mortgage. This exclusion does not appear in the 2006 Loan Policy.

6. Coverage for the "Gap"

Unless a contemporaneous search and examination of the title for all liens and encumbrances is made at the time of closing, the status of the seller's title will be unknown to the prospective purchaser. Therefore, it is always possible that a lien or encumbrance may, though the prospective purchaser and lender will not know of its existence, attach or become filed (1) after the effective date of the commitment for title insurance but (2) before the purchaser's deed is recorded, exposing the purchaser to loss attributable to any number of encumbrances arising through the seller. The inevitable time period between the latter and the former times is known as the "gap." Both the 2006 Owners Policy (Covered Risk 10) and 2006 Loan Policy (Covered Risk 14) contain new coverage for the "gap" between the Date of

Policy and date of recordation of the instrument that vests title (or the insured mortgage in the Loan Policy). However, gap coverage accorded insureds by the 2006 ALTA policies, though of value, should never be confused or equated with strikingly different coverage by the same name provided by an endorsement, known in most areas it is available as the Gap Endorsement, which commits the title insurer to raise no exception for matter that are filed between the effective date of the commitment and the date of the recordation of the instruments creating the estate or interest of the insured. Gap coverage provided by the former as measured by the duration of days or hours it spans is minute, but the latter usually significant and its availability, depending on the circumstances of the transaction, worth investigating.

7. Exclusion for taxes in the "Gap"

Both the 2006 Owner's Policy (Exclusion 7) and the 2006 Loan Policy (Exclusion 11) contain new exclusions from coverage for "any lien for real estate taxes or assessments... that become due or payable, but unpaid, between Date of Policy and the date of recording... in the Public Records." Thus, as among the various items against which the new Covered Risks provides coverage against matters during the "Gap," taxes that become liens during the "Gap" are excluded from coverage.

8. Electronic signatures

Covered Risk 2 of both the 2006 Owner's and Loan Policies include new coverage against loss from a defect caused by "failure to perform those acts necessary to create a document by

electronic means authorized by law,” and “a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law.” In addition, the 2006 Loan Policy includes in the definition of “indebtedness” the obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law.

9. Definition of “Insured” expanded to certain corporate successors, trusts

The definition of “insured” has been expanded by the 2006 Owner’s Policy to include several new successors of the named insured, including successors by dissolution, merger, consolidation, distribution, or reorganization and conversion to another kind of entity. In addition, the insured includes a grantee under a deed delivered without actual valuable consideration if the stock, share, memberships or other equity interests of the grantee are wholly-owned by the named insured, if the grantee wholly owns the named insured, and if the grantee is wholly-owned by an affiliated entity of the named insured, provided the affiliated entity and the named insured are both wholly-owned by the same person or entity. Finally, the insured has been expanded to include a trustee or beneficiary of a trust created by written instrument established by the insured for estate planning purposes. The expansion of the scope of parties that are covered by the policy means that counsel may come to inadvertently assume that their client’s business and estate planning-related conveyances will not jeopardize existing

coverage afforded by policies of title insurance that were issued when the real estate was acquired. On the contrary, counsel must always inquire of their clients before assuming that policy coverage remains in effect which of the ALTA policies were issued: The 1992 ALTA Owner's Policy, or the 2006 ALTA Policy? In the event that the 2006 Owner's Policy was issued, a deed by which the insured conveys her interest to a trust will not result in a lapse of coverage. However, in the event that the 1992 Owner's Policy was issued, the insured should refrain from conveying to her trust until an endorsement naming the trust as an additional named insured is obtained, for without the endorsement the trust will not be covered by the policy. Thus, to make the wrong assumption about which ALTA policy was issued could prove costly to client and counsel.

10. Definition of "Indebtedness" expanded

The definition of "indebtedness" has been expanded by the 2006 Loan Policy to include amounts advanced to assure compliance with laws and prepayment premiums, exit fees and other similar fees or penalties allowed by law.

11. Coinsurance deleted

The coinsurance provision of the 1992 Owner's Policy [Condition 7(b)] does not appear in the 2006 Owner's Policy.

12. Apportionment deleted

The apportionment provision of the 1992 Owner's Policy (Condition 8) does not appear in the 2006 Owner's Policy.

13. Arbitration

The arbitration provision of the 1992 Owner's Policy (Condition 14) was revised by the 2006 Owner's Policy (Condition 12) to increase the amount of insurance under which arbitration is required from \$1 million to \$2 million.

14. Advances

The 1992 Loan Policy provision that indicated that there was no coverage for advances after Date of Policy [Condition 8(b)] has been deleted from the 2006 Loan Policy. Although enforceability of advances made after Date of Policy are included within the coverage of the policy, the priority of such advances is not covered.

15. Payment of indebtedness that reduces amount of insurance

The 1992 Loan Policy condition [Condition 9(b)] that provided that the amount of insurance was reduced dollar for dollar by payment of indebtedness has been deleted from the 2006 Loan Policy. Therefore, the need for the Last Dollar Endorsement, an endorsement that is required under the 1992 Loan Policy when the loan was secured by both real and personal property, to prevent the reduction of liability under the policy until the loan was paid down to the policy amount, has been eliminated when the 2006 Loan Policy is issued.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.