

**COMMON UNDERRWITING ISSUES FROM A NATIONAL PERSPECTIVE**

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## **Back Chain Creditors' Rights Issues**

Although the 2006 Owner's and Loan Policies exclude creditors' rights issues from coverage, they only do so relative to the specific transaction covered by the policy being issued.

Unfortunately, unless an appropriate exception is raised in the policy, we continue to be liable for any creditors' rights issues that may be lurking in the chain of title leading up the current transaction.

Transfers that may be characterized as either preferential in nature or as a fraudulent conveyance create the most concern but are often overlooked. These issues arise when the underlying transaction leaves the debtor either undercapitalized or insolvent such as when there is an increase in a borrower's debt obligation or a decrease in assets without adequate or full consideration.

### **Preferences**

§547 of the Bankruptcy Code (11 U.S.C. §547) gives the bankruptcy trustee the power to avoid the transfer of any interest in property occurring within 90 days prior to the filing of the bankruptcy petition or 1 year if the transfer is made to an insider. The specific elements of what constitutes a preference are set out in §547(b) and are as follows:

A transfer of an interest of the debtor in property (1) to or for the benefit of the creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition, and (5) one that enables the creditor to receive more than such creditor would receive in a Chapter 7 liquidation of the estate.

It is not necessary for the trustee in a §547 action to prove that the debtor is in fact insolvent, insolvency is simply presumed to be the case relative to any transfer made within the 90 day period. There is also no requirement for the trustee to prove that the benefitted creditor knew or should have known that the debtor was insolvent at the time of the transfer. Simply put, all transfers that occur within the 90 day period prior to the filing of the petition are at risk of being challenged.

In order to determine if the transfer occurred within the 90 day period, you must look at not only the date that the interest was created as stated in the instrument, but also when that instrument was recorded in the real estate records. A refinance or purchase money mortgage closed before the 90 day period and recorded within 30 days, even when recorded within the 90 day preference period, is deemed to have occurred prior to the 90 day period. Transactions recorded outside of this window, however, are at risk.

## **Fraudulent Transfers**

§548 of the Bankruptcy Code (11 U.S.C. §548) governs fraudulent conveyances. This section allows the trustee or a creditor to avoid a transfer by the debtor that was made "with actual intent to hinder, delay, or defraud an entity to which the debtor was or became... indebted."

§548(a)(1)(B) also allows an avoidance action for transfers for which the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation," and where the debtor "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation," or as a result of the transfer or obligation, the debtor became undercapitalized. Unlike the shorter limitations provided in §547, the look back period for §548 actions is two years, and this period may be further extended by state law.

The primary concern and focus is whether the debtor received sufficient value (i.e., value for value), and whether the transaction rendered the debtor insolvent or undercapitalized. A common example of a §548 violation is when a debtor pledges its property as security for a loan, but the loan proceeds are disbursed in favor of a related, but different, entity. In this situation, the debtor has taken on a new obligation while receiving no benefit. Another example arises in the situation where an unsecured creditor attempts to strengthen its position by demanding the debtor pledge property as security for the loan. In this instance, one of the debtor's assets is encumbered, with the debtor receiving no additional value in return. In both examples, the debtor's equity in its assets declines, while its debt obligations increase.

§548 is particularly perilous when you see a transfer in the back chain of title as the lookback period applicable to fraudulent conveyances can extend well beyond the two years provided for in the Bankruptcy Code if the bankruptcy trustee chooses instead to use state law to attack the transaction. State law often provides an advantage to the trustee as state statutes frequently provide a longer statute of limitations than that afforded by §548. In some cases, states statutes allow for as long as a six (6) year lookback period. Accordingly, care should be taken whenever a questionable transaction is noted in the back chain.

### **Scenarios**

#### **1. Deed in Lieu Transactions**

When the value of the property transferred by a deed in lieu is greater than the outstanding balance owed on the loan that transfer may be challenged either as a preference under §547 or a fraudulent conveyance under §548. A trustee may still challenge the transaction even when the value of the property appears to be less than the loan amount if the trustee feels that property was not properly appraised.

2. No consideration transfers to a related party or an SPE

Since these transactions do not involve an exchange of “reasonably equivalent value”, they are easily challenged as either actual or constructive fraud. Transactions in which there is an agreement not to record something; the transfer price is far below the market value; are done in the middle of litigation; or are done when the debtor was insolvent or when the debtor was made insolvent by the transfer, are all signs of a possible fraudulent transfer.

3. Up-Stream, Side Stream, and Leveraged Buy-Out Transactions

Up-stream transactions describe transactions between a parent and subsidiary while side-stream transactions are between sister companies. They can be identified when the loan proceeds do not go to the same party that has put the property up for collateral. In these situations, an interest in the real estate has been transferred by the fee owner without that same owner also receiving the proceeds of the loan.

Leveraged buy-outs are generally associated with the acquisition of a business. In these transactions, the property being mortgaged is not owned by the business but by the owner of the business. Neither the excess cash nor the loan proceeds are set aside either for the operation of the business or for the creditors.

4. Mortgage Foreclosures

If the foreclosure bid amount is less than the reasonably equivalent value of the property, the foreclosure sale may be challenged if the former fee owner files for bankruptcy. The theory here is that the loss of equity in the real estate has deprived creditors of potential assets and consequently the sale is invalid.

It should be noted that the U.S. Supreme Court in BFP v. Resolution Trust Corporation held that a foreclosure sale is valid for §548 purposes, regardless of the bid price, so long as the foreclosure sale was pursuant to a noncollusive, regularly conducted nonjudicial sale. This decision, however, is limited to §548 challenges and such sales are still in danger of being found invalid as a preferential transfer under §547. (See, In Re Villarreal; and In Re Whittle).

### **Exception**

If a back chain issue is noted, the following exception must be taken in Schedule B regarding the transfer:

Any claim which arises out of the transfer from \_\_\_\_\_ to \_\_\_\_\_,  
dated \_\_\_\_\_ and recorded on \_\_\_\_\_ in Book \_\_\_\_\_, page \_\_\_\_\_, by reason of  
the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws.

## Deeds in Lieu Transactions

Deeds in lieu of foreclosure transactions present a number of potential title issues which must be carefully analyzed before agreeing to insure either the lender's ownership interest or any subsequent conveyance. These types of transactions are generally entered into between borrowers and lenders in order to avoid foreclosure proceedings and are recognized by most courts as a legitimate and efficient alternative to a foreclosure proceeding.

When a deed in lieu is taken by the lender, one of the primary questions that must be addressed is whether the lender's new fee interest has merged with its mortgage interest thus terminating or extinguishing the mortgage. In order to avoid this possibility, some jurisdictions require that specific anti-merger language be inserted into the deed. The existing mortgage should nevertheless continue to be shown as a title exception until it is formally released. Additionally, unlike a normal foreclosure, a deed in lieu transaction does not extinguish any other liens or encumbrances that may exist on the property. Therefore these junior interests must also continue to be shown as exceptions to title unless they have been released by the proper party.

In addition to the "merger" and "junior interest" concerns, the following issues may also be grounds to attack the transfer:

1. The deed is in reality an equitable mortgage. In other words, from the structure of the transaction it is evident that the parties did not intend that the deed be an absolute conveyance but intended it to act as security for the debt. Any scenario in which the debtor has the right to remain in possession of the property after the conveyance or has been granted any type of repurchase option could be construed as an equitable mortgage as the rent payments may in reality be payments on the loan obligation. It is imperative that an inspection of the property be made to determine the debtor's possession status prior to committing to insure the transaction.

An estoppel certificate, executed by the party who is providing the deed in lieu, should be obtained as part of every transaction. This certificate is an affidavit that should clearly state that the deed is not being given as additional security and it is the grantor's express intent that the conveyance is intended as an absolute conveyance in which the grantor understands and intends to divest itself of all right, title and interest in and to the property.

2. A deed in lieu transaction is often nothing more than a clog on the debtor's right of redemption. Clogging refers to the cutting off of either the debtors or junior creditors rights to redeem the property from foreclosure. For example, if a debtor agrees to give a deed in lieu of foreclosure if certain future events occur, the right of redemption is forfeited upon the occurrence of the triggering event. Another example is in the case where the lender has been granted an option to purchase the mortgaged property at some future time. Such an option should not become automatically effective upon the debtor's default and should be set a fair market value. If the option purchase price is set for an

amount that is less than the amount owed on the note or for a fixed price and was granted simultaneously as part of the original loan transaction, it will be considered a clog.

3. The transaction may be set aside pursuant to a bankruptcy filing as either a preferential transfer (Section 547) or fraudulent conveyance (Section 548) or attacked under a state's fraudulent transfer statutes. Preferential transfers carry a look period of 90 days (one year if the transfer is to an insider) and fraudulent conveyances have a look back period of two years or longer if allowed under state law.
4. Lack of or unfairness of the consideration given for the transaction or the transaction is the product of fraud duress or undue influence.

A lender's ALTA loan policy, by its terms, remains in force if fee title is obtained either by foreclosure or a deed in lieu of foreclosure. If the lender wants coverage through the date of acquisition of the fee title, rather than simply update the existing loan policy, an owner's policy in an amount equal to the outstanding principal indebtedness owed, plus any additional interest, taxes and expenses which may be due or for the current fair market value of the property should be issued at the appropriate filed rate.

Finally, if the search discloses a deed in lieu of foreclosure recorded in the chain of title within 90 days prior to the current transaction, additional requirements and exceptions may be needed. For example, it may be necessary to confirm that the grantor of the deed in lieu has not filed bankruptcy. In addition, you may be required to obtain verification of the outstanding balance of the recently released debt in order to compare it to the current sale price. Otherwise, it may be necessary to insert a creditor's rights exception into the new policy.



## **Fraud Schemes**

Fraud and forgery continue to be one of the top sources of claims in the industry. With improving market conditions, we are seeing a reemergence of some of old schemes as well as the emergence of some new schemes. While it may be impossible to entirely prevent fraud or forgery in every instance, due diligence and vigilance can prevent many such claims from happening.

### **Schemes**

#### **E-Mail Hacking**

The scam involves the use of hacked e-mails to redirect transaction proceeds to an account controlled by the hacker.

This scheme begins with the e-mail account of a party to a transaction being hacked and monitored without that party's knowledge. The hacker chooses a transaction, determines its details and identifies the parties involved. An e-mail, appearing to be both legitimate and from a proper party, is then sent directing the entity holding the targeted funds to wire those funds to an account controlled by the hacker. Since everything appears genuine, the funds are wired as instructed and then stolen by the hacker.

To avoid this scheme, it is necessary that all e-mails directing the transfer of funds be verified by using a valid phone number for the party from whom the e-mail was supposedly sent. Do not rely on the phone number or other contact information shown in the suspect e-mail or its attachments. Be very cautious if the e-mail or wire instructions have been sent outside of normal business hours or direct the funds to be sent to a bank or account located outside of the state where the real property which is the subject of the real estate settlement is located. It is also recommended that your customers be alerted to this scheme and to inquire about responses to e-mails that they have not sent.

In the event you suspect any unusual activity has occurred relating to either your e-mail account or a wire transfer, you should contact your bank immediately with directions to discontinue all wire transfers from your escrow accounts until further notice. It is also imperative that your e-mail provider be immediately informed of your hacked account. As additional safety precautions, at a minimum, we strongly recommend the following steps:

1. Closing your browser when your computer is not in use;
2. Changing passwords frequently;
3. Being aware of and reporting unusual situations or possible virus attacks;
4. Installing anti-virus software on your home computer;
5. Installing a firewall for your home computer;
6. Avoiding websites you don't trust;
7. Not sending wire information or other business sensitive data from a personal e-mail account, such as your home gmail or yahoo e-mail account; and
8. Encrypting all e-mails containing wire instructions or other sensitive information.  
Encrypting e-mails is typically a fairly straightforward process but varies with each e-

mail provider. Your specific e-mail provider should be able to provide the necessary instructions.

### **Fraudulent Cashier's Checks**

The typical scheme begins when a purported buyer sends an earnest money deposit in the form of a cashier's check to a title agent. A day or two later the "buyer" informs the title agent that the transaction has died and requests a wire return of the earnest money. The agent wires the funds as instructed without waiting for notification from its bank that the cashier's check has cleared the bank collection process.

While there are many variants to the scheme, one or more of the following red flags are typically present:

1. No contact information for the seller is provided;
2. The buyer is out of the Country;
3. The cashier's check is received from another Country (meaning the postmark or return address is not within the United States);
4. The transaction is purportedly to be an all cash transaction; and
5. The agent has no prior relationship with the buyer.

To avoid this scheme, it is important that no earnest money or other purported transaction funds are returned until such time as the original cashier's check has cleared or you have independently verified its validity with the issuing bank. If you have any doubts or concerns regarding either the cashier's check or the return of the funds, please contact MVT to discuss the particular facts.

### **Fraudulent Mortgage Releases and Naked Satisfactions**

Forged releases of mortgages often involve either (1) mortgages which have been released within 12 months prior to the date of the current commitment or preliminary report and, (2) to a lesser degree, unreleased mortgages where the seller, buyer or a third party presents a fraudulent un-recorded release at or just prior to the real estate closing.

Usually, most real property is encumbered with a mortgage or deed of trust securing an owner's debt or obligation to a lender. So, when a title examiner or title searcher determines from their search that the subject land is "free and clear" of mortgages or deeds of trust, that fact is a red flag requiring further investigation. The outcome of that investigation should also be documented in the title file.

In order to prevent a claim, in addition to any other precautions your operations are already using, the following precautions should be implemented prior to closing a transaction where an outstanding mortgage in your chain of title has been released outside your closing within the prior 12 months:

- a. If a mortgage has been released without an associated sale or refinance, then the

lender should be contacted for confirmation that their loan has been paid off and their security has been satisfied or released. Typically, a sale or refinance will involve a conveyance of the land to a bona-fide purchaser for value with a concurrent mortgage or alternatively, a refinance mortgage.

- b. If the seller, buyer, or third party presents a mortgage release or satisfaction to the escrow officer or closing officer at or prior to closing for an uncanceled loan, the closing officer should contact the lender for confirmation that the loan has been released. Contact the lender in the same fashion you would use if you needed current demand pay-off figures. Do not rely upon any contact information supplied by the parties to the transaction.
- c. If the land being searched is "free and clear" of any mortgages or of any deed of trust where the owner has been the owner for less than 5 years, then please contact MVT for underwriting direction.

### **Fraudulent Loan & Short Sales**

The typical scenario for this type of scheme involves a search that reveals both an existing first mortgage securing a loan from an institutional lender and a second or junior mortgage from a private, non-institutional, lender. The second mortgage is typically devoid of any company identifiers and appears to be uninsured. The title search will then show a release of the first mortgage and, within a few weeks after the second mortgage is recorded, you are asked to insure a short sale where the purported non-institutional lender is agreeing to accept less than the amount owed allegedly owed. The fraudulent second mortgage is often signed by the owner as part of a foreclosure rescue scam, but of course there is no actual loan and the first, legitimate, mortgage was never paid. The release of the legitimate mortgage is often a very good forgery and gives the illusion that the fraudulent mortgage was a refinance of the legitimate mortgage.

The red flags to be aware of are as follows:

1. The new fraudulent deed of trust appears to be uninsured.
2. The new lender on the fraudulent deed of trust is a private lender.
3. The fraudulent lender is allegedly agreeing to a short sale only a few months after making the loan. Short sales typically do not involve recent loans.

If you are asked to insure a short sale where the loan was made within the last two years please be cautious of these red flags indicating a possible fraudulent transaction and do not hesitate to contact underwriting for assistance.

### **Fraudulent Vesting Deeds**

Most legitimate real estate transactions are handled by law firms or title companies, a deed prepared by a party outside the title industry is legitimate cause

for concern. In the worst case, the deed may not be genuine. However, even if it is genuine, it may suffer from technical defects such as a faulty legal description or improper execution. Finally, do not give undue credibility to a deed that appears to have been prepared by a title professional. The deed may have been prepared by a law firm or title company and fraudulently executed later, or the forger may have prepared the deed with a false scrivener to give the deed the appearance of legitimacy.

## **Flip Scams**

Flip transactions are becoming very popular. Because of the built in dangers for fraud in these transactions, you need to look at each one very carefully before you close. Most flip transactions involve an Original Seller (A) who conveys to Buyer (B), Buyer (B) then conveys to the ultimate Buyer (C) for an increased sales price. Most flip transactions are completed within a day or two of the original purchase from A.

The red flags to be aware of are as follows:

1. **An extremely large increase in the sales price to C.** While there is nothing wrong with making a profit, an excessive amount, with no justification for the large increase, is suspicious.
2. **Inflated Appraisals.** Know the appraiser. Check his credentials and work history if the appraisal shows a much larger value than the original sales price. Double check against the tax appraisal. If there is a large difference, there may be problems.
3. **Follow the money.** If B has to have the money from his flip to C in order to pay closing costs or the sale price to A - DO NOT CLOSE.
4. **Repairs.** Often no repairs are being done but this is used as a method to get money in B's pocket. You should require a mechanic's lien contract with a valid 3rd party lender and ask to review invoices. The policies will need the pending disbursements and completion of improvements language in Schedule B.
5. **Broker Fees/Management Fees.** Broker fees must be in the range of your normal transactions. Excessive fees are a danger signal. Large or unusual management fees are an indication of fraud and should be questioned.
6. **Closing Instructions.** As always, you should carefully read and follow all lender instructions. Some lenders including FHA lenders have a requirement that property be held for a minimum length of time before transfer. All other requirements should be met or waived in writing by the lender. This is an important consideration by the courts in determining title company liability if a flip transaction is challenged.

## **Powers of Attorney**

Transactions involving a fraudulent Power of Attorney (“POA”) have resulted in considerable claims losses and because they are specifically designed to be used in the absence of the grantor, need to be closely scrutinized.

POAs can be used for many purposes and can take many forms. In our business, we may see several different types of POAs. Some of the more common examples are as follows:

1. **General power of attorney:** a broad grant of power to an agent to transact business on behalf of the principal.
2. **Special or Limited power of attorney:** a grant of power to an agent to conduct only a certain, specified matter for the principal.
3. **Durable power of attorney:** a grant of power to an agent that continues after the disability or incapacity of the principal.
4. **Irrevocable power of attorney:** a grant of power to an agent that the principal cannot revoke.
5. **Springing power of attorney:** a grant of power to an agent that does not take effect until some specified future date or occurrence (commonly the grantor’s incapacity).

When accepting a power of attorney in the context of a transfer of interest in real estate, you must carefully review the document and be certain the agent is authorized to act. If you are presented with a special or limited POA, you should ascertain that the agent has been specifically authorized to convey, encumber or otherwise transfer an interest in the subject real estate. This does not necessarily mean that the subject property be identified by address or legal description, but rather that the grant of power unquestionably authorizes the attorney in fact to act on behalf of the grantor with respect to either the subject property, or all of the grantor’s real estate.

Before proceeding with a transaction under a power of attorney, you should verify that the POA is still valid and unexpired. At a minimum, you should review the public records to ascertain that a revocation of the POA has not been recorded. You should also verify that the grantor is not deceased, incompetent or bankrupt. Additionally, you may want to contact the grantor personally to verify that the POA is legitimate, and that the attorney in fact is not an imposter or fraud.

Red flags include the following:

1. The signature of the grantor or principal is visually different than the signature that appears in a prior transaction.
2. The grantor or principal can’t be contacted.
3. The grantor or principal is available but “too busy” to personally execute the documents.
4. The POA contains some flaws with the statutorily required formalities.
5. The proceeds being paid to someone other than the principal.
6. The grantor or principal’s property is vacant.
7. Need to close quickly and/or threats to move the transaction to another title company.
8. The POA presented is only a copy and an original is not or cannot be made available.

## **FIRPTA AND SHORT SALES**

Foreign persons are not immune to the housing bust that began in the late 2000's and FIRPTA issues can certainly arise in short sale situations, where they can derail even the most well-planned short sale. Since FIRPTA is not usually on the minds of the parties to a short sale or even their realtors, it often falls on the closing agent to bring up the issue.

### **I. INTRODUCTION TO FIRPTA**

The Foreign Investment in Real Property Tax Act ("FIRPTA"), codified at 26 USC § 1445 (see also Treasury Regulation 26 C.F.R. § 1.1445-1), was first enacted back in 1980. The main provision of FIRPTA, which affects title agents, requires the withholding and subsequent remittance to the IRS of 10% of the "amount realized" by a foreign seller of a US real property interest unless one or more exemptions apply to the seller or the transaction.

FIRPTA does not actually impose requirements to withhold and remit funds to the IRS directly on the title agent. These requirements are imposed on the Buyer, although the title agent usually ends up with the responsibility of making sure that either FIRPTA does not apply to the transaction or that, if it does, the correct forms are filled out and submitted to the IRS along with the correct amount of withholding. Since the agent oversees this whole process during closing, a thorough understanding of when FIRPTA applies, what exemptions are available and how to complete the forms and remit to the IRS is necessary. Non-attorney settlement agents need to exercise caution in dealing with the parties in FIRTPA situations because, should the IRS determine that FIRPTA's provisions were not properly followed, the buyer or the seller may try to place the blame on the settlement agent.

Documentation and disclaimers regarding the scope of the settlement agent's duties are key. In certain situations, a hold harmless may be advised to protect the agent.

### **II. BASIC STATUTORY REQUIREMENTS FOR WITHHOLDING**

The basic rule of FIRPTA is that, unless a special exemption applies, whenever a foreign person disposes of a United States real property interest, the Buyer is required to deduct and withhold 10% of the amount realized from the consideration paid over to the foreign Seller. This rule contains four main concepts that are defined terms under the Internal Revenue Code and accompanying Treasury Regulations and whose definitions are key to proper application of FIRPTA in a variety of circumstances, particularly short sales. These terms are: "Foreign Person," "Real Property Interest," "Buyer" and "Amount Realized."

## **A. Understanding the Terminology**

### **1. Foreign Person**

A “foreign person” is (1) an individual that is not a US citizen or a resident alien, (2) a foreign corporation that has not elected to be treated as a domestic corporation or (3) a foreign partnership, trust or estate. Whether the Seller of a real property interest is a foreign person under FIRPTA is a matter of law and not one to be determined by someone who is not a tax professional. Therefore, any settlement agent that is not a tax professional should not be deciding whether a given Seller is a “foreign person” or not under FIRPTA. For FIRPTA purposes, any entity that is considered to be a “disregarded entity” for tax purposes, such as a single-member LLC, is not considered to be the Seller for purposes of determining whether the Seller is a foreign person or not. It is the principal of that entity that is considered the Seller. So, a single-member LLC formed under the laws of a given state whose sole member is a non-resident alien could be considered to be a foreign person under FIRPTA.

### **2. United States Real Property Interest**

While determining whether a Seller is a “foreign person” under FIRPTA can be difficult, it is generally a given that the title agent is dealing with a “real property interest” or else title insurance would not be involved. Section 897 of the Internal Revenue Code (26 USC § 897) defines “US real property interest” to include, among other things, any interest in real property that is located anywhere in the United States including the US Virgin Islands. This would include any fee simple, leasehold, life estate, remainder or easement interest in real property.

### **3. Buyer**

FIRPTA defines the term “Buyer” as any person that “acquires a US real property interest by purchase, exchange, gift or any other transfer.” It does not matter whether the Buyer is a foreign person or a US person. FIRPTA withholding requirements apply only when the Seller is a foreign person.

### **4. Amount Realized**

The “amount realized” is defined as the total of the amount of cash paid by the Buyer plus the fair market value of all other property given to the Seller by the Buyer in exchange for the US real property interest at issue, **plus** “the outstanding amount of any liability assumed by the Buyer or to which the US real property interest is subject immediately before and after the transfer.” In other words, Cash to be paid + FMV of other property to be transferred + the amount of any lien which the Buyer is assuming. In plain English, this means that the “amount realized” generally equals the amount the buyer is paying for the property (in cash and other property) plus the outstanding amount of any mortgage or other lien that the buyer might be taking the property subject to. For example, if the buyer was paying the seller \$50,000 in cash,

assuming the seller's mortgage which had an outstanding balance of \$50,000 and also giving the seller a boat worth \$25,000, the amount realized by the seller would be the total of these three things, or \$125,000.

It is important not to confuse "amount realized" with "gain." FIRPTA withholding is based on the "amount realized" as defined above and not whether the seller is losing money on the sale or whether the property is worth more or less than the liens that encumber it. This is important because some people mistakenly think that the "amount realized" for FIRPTA purposes on a short sale is zero. THIS IS NOT TRUE. In fact, there was a private letter ruling that specifically addresses this common misunderstanding.

### **III. Figuring the Withholding**

In the absence of an exemption situation (discussed below), the amount of tax to be withheld is usually equal to 10% of the amount realized which, as was discussed above, is generally the contract price. So, for a contract price of \$150,000, the withholding amount is \$15,000. This would leave \$135,000 for any loan or other encumbrance payoffs, commissions and all closing costs. When there are joint Sellers and not all are foreign persons, withholding is required on that portion of the contract price that bears the same ratio to the whole price as the foreign person's ownership interest bears to 100%. Husband and wife considered to each own a ½ interest in real property. So, if real property which is being sold for \$300,000 is owned by a husband and wife and only the husband is a foreign person, then FIRPTA withholding would only be due on ½ of the sale price. When there are multiple foreign Sellers, the agent may allocate the withholding among the foreign Sellers as they agree.

The agent is well-advised to ask about the applicability of FIRPTA as soon as the contract arrives at their office. It is entirely possible, particularly in a short sale situation, that failure to consider FIRPTA early on could result in the seller (or someone else) having to bring money to the closing table to pay the withholding in order for the sale to go through.

### **IV. EXEMPTIONS TO FIRPTA WITHHOLDING**

FIRPTA provides several exemptions to the requirement to withhold 10% of the amount realized when a foreign person disposes of a US real property interest. These exemptions are introduced in the FIRPTA statute (26 USC § 1445) and are described in greater detail in several Treasury Regulations. For purposes of this seminar, only exemptions described in 26 C.F.R. § 1.1445-2 and 26 U.S.C. § 1.1445-3 will be discussed as the others will generally only be encountered in more complex commercial transactions involving entities such as corporations and partnerships.

#### **A. Furnishing of a Non-Foreign Affidavit**



This first exemption basically states that if a Seller provides to the Buyer or a qualified substitute a non-foreign affidavit that contains, under penalties of perjury, the Seller's United States taxpayer identification number and an assertion that the Seller is not considered to be a "foreign person" then the Buyer is not obligated to withhold any portion of the sales price. When this exemption is relied upon, the Buyer is required to retain the affidavit for at least five years following the tax year in which the sale took place.

The Buyer is not permitted to rely on any certification of the Seller stating that he or she is not a foreign person under FIRPTA if the Buyer either has knowledge that the certification is false or receives notice from either the Seller's agent or qualified substitute or the Buyer's agent or that the certification is false. Title agents might pause at this point and ask whether they might be considered agents or qualified substitutes of either the Seller or the Buyer. 26 USC § 1445(3) and (4) and 26 C.F.R. § 1.1445-4 define Seller's agent and Buyer's agent, respectively, as a person who represents the Seller or Buyer in any negotiation with the opposite party regarding the transaction or in settling the transaction. However, 26 USC § 1445(5) goes on to state that for FIRPTA purposes one will not be considered to be an agent of the Seller or Buyer simply because he or she "performs one or more of the following acts:

- a. The receipt and disbursement of any portion of the consideration for the transaction; or
- b. The recording of any document in connection with the transaction."

The term "qualified substitute," which was added as part of the American Housing Rescue and Foreclosure Prevention Act of 2008, is defined as either "(A) the person (including any attorney or title company) responsible for closing the transaction other than the Seller's agent, and (B) the Buyer's agent." Therefore, the title/settlement agent should be extra cautious when dealing with non-foreign affidavits and may want to make an appropriate disclosure if he or she has knowledge that the affidavits contain false statements. The penalties to the Buyer that knowingly relies on a false affidavit can be severe and the Buyer may try to shift the liability to the agent.

#### **B. Purchase of a Residence for \$300,000 or Less**

One of the most common FIRPTA exemptions applies when the property being sold is a personal residence, the Buyer is an individual and the sale price is \$300,000 or less. If the Buyer, the Buyer's spouse, sibling or any of the Buyer's ancestors (parents, grandparents, great-grandparents) or lineal descendants is going to reside on the property for at least one-half the time the property is going to be used as a residence during the first two years following the transfer, then the transfer is exempt from FIRPTA withholding requirements.

Any time that the property will not be occupied by anyone during the first two years is not considered when determining whether the exemption applies. For example, if the Buyer purchases a vacation home for \$250,000 and plans to reside in it himself for one month out of the year, allow his sister and her family to stay there one month out of the year and his best friend to live there one month out of the year for the first two years, then the exemption will apply because the property will be vacant for nine months and occupied by the Buyer and the Buyer's sibling for 2/3 of the time it is being occupied during the first two years. A Buyer's affidavit can be used to create a paper trail for the agent's file to show that no moneys were withheld in reliance on this exemption.

### **C. Issuance of a Withholding Certificate by the IRS**

The third exemption available to reduce or eliminate the need to withhold under FIRPTA is the withholding certificate, which is discussed extensively in Treasury Regulation 26 C.F.R. § 1.1445-3. This waiver is accomplished by completing IRS Form 8288-B in advance of the sale and having the seller present the form with the IRS's approval to the agent at or before the closing. If the agent is presented with a pre-approved withholding certificate, all the agent needs do is abide by the determination in the certificate, which might be to withhold the entire 10%, withhold some amount less than 10% or withhold nothing. If full or partial withholding is required, Form 8288 must be submitted to the IRS with payment as usual, but a copy of the withholding certificate must also be attached. The withholding certificate may also be conditioned upon the Seller signing an agreement for the payment of the tax due on the transfer, which will also require the posting of security for the payment of that tax in the form of a bond or a letter of credit by the taxpayer.

It usually takes several months for the IRS to issue a withholding certificate. The mere filing of an application for a withholding certificate does not eliminate the need to withhold the 10%. However, if the closing agent is provided with proof that an application for a withholding certificate was filed with the IRS, then the actual payment of withheld funds can be delayed until 20 days after the IRS mails out either a withholding certificate or a notice of denial.

### **D. Seller's Non-Recognition of Gain or Loss**

A foreign Seller may be able to determine in advance that he or she will not have to recognize any gain or loss from a transaction. In such a case, he, she or it (in the case of an entity) may wish to take advantage of the exemption available under 26 C.F.R. § 1.1445-2(d)(2) which allows a Seller to provide a Buyer with a signed statement verified as true under penalty of perjury that the Seller is not required to recognize any gain or loss with respect to the particular transaction. According to the governing regulation, the Seller has until the 20th day following the transaction to supply the Buyer with the notice and a cover letter to be sent to the IRS. This exception does not apply for simultaneous 1031 like-kind exchanges or other transactions that do not have complete nonrecognition of gain or loss.

The statement does not need to be on any particular form, but it does need to contain the following elements: (1) a statement that the writing constitutes a notice of a transaction that qualifies for nonrecognition or is governed by a treaty provision pursuant to the requirements of 26 C.F.R. § 1.1445(d)(2); (2) name, address and taxpayer ID number of the Seller; (3) a statement that the Seller does not have to recognize gain or loss in the transaction; (4) a short description of the transaction itself and (5) a short discussion of the facts and law that justify the conclusion that the transaction qualifies for nonrecognition of gain or loss. The Buyer may not rely on any such statement if the Buyer knows or has reason to know that the transaction does not qualify for nonrecognition in its entirety.

This exemption is not one that is used very often. However, it is available to the foreign taxpayer, so the agent should be aware of it. It is up to the Seller and the Buyer to come to an agreement regarding this exception and whether both parties are comfortable relying on it. The prudent agent will keep a copy of the statement and some evidence that the Buyer agreed to not withhold based on this exemption to avoid any problems for the agent later on should the IRS determine that the transaction did not qualify for nonrecognition.

## **V. SHORT SALES**

As mentioned above, much of the trouble between FIRPTA and short sales comes from a misunderstanding of the term “amount realized”. There are no regulations that specifically address FIRPTA and short sales and also no binding determination of how to calculate the amount realized in a short sale situation. One might be tempted to say that the amount realized is zero because the seller is not getting any proceeds. Although seemingly logical, this would be incorrect. A foreign person who purchases a home in the US for \$300,000, takes out a \$400,000 mortgage loan when the value increases to \$500,000 and then has to sell short for \$350,000 when the real estate market crumbles walks away with no proceeds. Nevertheless, this would trigger FIRPTA withholding of at least \$35,000, i.e. 10% of the purchase price. However, the amount realized would also include the amount of any indebtedness which the Buyer takes subject to or to which the property was subject immediately before and after the transfer. In this situation such as this, there is forgiveness of debt and the 10% should be calculated on the sum of the contract price plus the amount of debt forgiven. Using this method of calculation in our example above, the withholding amount jumps from \$35,000 to \$40,000 assuming the lender gets all the proceeds from the sale (which, of course, is never the case) and the amount due on the loan is still \$400,000 at the time of the sale.

Even assuming that the “amount realized” could be accurately determined, it still has to be listed as a line item on the preliminary HUD that is submitted to the short lender to avoid having a last-minute disaster derail the short sale. The short sale lender might refuse to approve a short sale if the transaction is subject to FIRPTA withholding or may require that the funds necessary to meet the withholding requirement be brought to the closing table by the seller, the buyer or some third party. While a withholding certificate would give an exact determination as to whether

withholding was necessary and, if so, how much, the application would have to be filed many months in advance of the request for short sale approval in order to have the withholding certificate issued by the time the preliminary HUD is sent to the short sale lender.

## **VI. CONCLUSION**

While all the nuances of the FIRPTA statute and accompanying regulations may seem overwhelming, they illustrate why it is best to start to address any possible FIRPTA issues as soon as possible (ideally when the realtor takes the listing) in order to avoid any unpleasant surprises and minimize the chance of closing disasters. Although the non-attorney agent can offer little help in answering FIRPTA questions, simply raising the issue and being familiar with the process, the exemptions and the forms can go a long way toward helping the transaction close as smoothly as possible. Also, by being familiar with the potential pitfalls, the agent can hopefully take the necessary steps to protect himself or herself by obtaining copies of the appropriate documents, advising the parties to seek the assistance of qualified tax professionals and, if desired, obtaining disclaimers and hold harmless agreements. As always, whenever an agent has a FIRPTA question, he or she should feel free to contact the Old Republic Underwriting Department for assistance.

## Underwriting Mechanic's Lien Issues

Insuring a mortgage where there is no priority or before the intended improvements have been completed is extremely risky and should not be undertaken lightly. Mechanic's liens are a significant source of claims and mechanic's lien coverage is among the most hazardous coverage provided. The primary reason mechanic's liens continue to present such a challenge is that, unlike a typical lien scenario, priority does not necessarily depend on what notice or instrument is recorded first. The statutes of many states provide special priority protection for those providing labor or materials for the improvement of property such that their liens relate back to the start date of the project. In some states this risk is magnified by allowing the priority of all potential claimants to relate back to the commencement of work by any one on the project. Thus, a lien filed by a landscaper 18 months after the excavator started work would relate back and have its priority date run from the date the excavator began work.

Mechanic's lien claims predominantly arise from the following two sources:

1. Early start and split priority; and
2. Insufficient indemnifications.

### **Early Start and Split Priority**

Early-start or pre-start refers to construction work undertaken prior to the recording of the construction financing. These present an obvious risk as lien claims often relate back to the first improvement made or materials supplied to the project and therefore gain priority over the insured mortgage. Accordingly, a thorough inspection of the subject property may be necessary before extending mechanic's lien coverage to ensure that no work has begun. At a minimum, a sworn statement, affidavit and/or indemnification should be obtained from the borrower and contractor, either stating that no work has been initiated, or that ORT will be indemnified for any losses relating to work commenced prior to the recording of the insured mortgage. It is also highly recommended that pictures be taken of the property commensurate with the recording of the mortgage as proof of the priority of the insured mortgage.

Claims may also arise as a result of split priority issues. These issues come about in two primary ways. First, if the loan documents do not clearly obligate the lender to make the construction advances but instead allow for lender discretion on whether or not to make an advance, then such discretionary or optional advances made after the start of construction could be considered junior to a claimant's mechanic's lien interest. To avoid this, a thorough review of the construction loan documents is required to ensure that the lender has not gotten careless and neglected to include mandatory construction loan language.

Second, if the underlying debt of the insured mortgage is modified, you need to determine if such a modification creates a novation that eliminates the initial priority of the mortgage. Additionally, even if it's determined that priority has not been jeopardized by the modification any increase in the loan amount may put the "new money" behind a contractor's lien rights

## Indemnifications

Obtaining an indemnification from borrowers and general contractors is a common solution used to mitigate the risk of loss in mechanic's lien situations. However, it is important to remember that an indemnity without financial viability does little to mitigate a claim. Current financial statements should be obtained from the proposed indemnitor which show all relevant financial information and which disclose that the indemnitor has sufficient liquid assets to finish the project if currently identified sources of funds prove inadequate. Financial statements should be certified through a reasonably current date. Audited financial statements are preferred, as they are generally more reliable than unaudited statements. An indemnification and review of financial statements should not be a substitute for obtaining statutory priority when and where possible, nor should receipt of an indemnity be a substitute for requiring that adequate funds to complete construction be committed to and available for disbursement when we agree to delete the exception for mechanic's liens.

Alternatively, if a viable indemnification is not possible other sources of loss mitigation should be considered such as payment and performance bonds, escrowed funds, unconditional lien waivers or executed releases.

The surest way to guard against mechanic lien claims is to strive for statutory lien priority. Where this is not possible, know the risks, obtain adequate assurance that any intervening interests will be resolved, and exercise caution in underwriting. Identified funds committed to construction should exceed the costs of construction and the construction budget should contain an adequate "cushion" or "contingency" category to meet unexpected costs and overruns. If costs to complete the project exceed currently identified funds irrevocably committed to the project, the risk should not be accepted and coverage should be declined.

At a minimum the following items should be considered, reviewed and analyzed before agreeing to delete the mechanic's lien exception:

1. The Construction Contract – Determine if it's a guaranteed maximum price or a cost plus contract;
2. Construction Budget detailing the sources and uses of all funds;
  - a. How much of a contingency is built in
    - i. We look for a minimum of 5%
  - b. Know the difference between the loan amount and the cost of construction.
    - i. Is this shortfall being paid from owner's equity or from the profit derived from future sales?
    - ii. It is generally required that the additional equity funds be advanced prior to the disbursement of any loan funds.
3. Audited financial statements for any individual or entity from whom an indemnity will be taken.
  - a. Look for liquid assets
  - b. Discount value of "Goodwill"
  - c. Look for any obvious red flag warnings

- d. They are also required to be reviewed by Old Republic's Underwriting and Treasury groups.
4. Statement as to what's been disbursed so far, if anything, and an audit of unconditional full and final lien waivers for all payments made.
5. Consider the amount of equity the owner has in the property.
6. Who will disburse the loan funds and how will the project be monitored to ensure the construction costs and funds stays in balance?
7. Consider inserting a mechanic's lien exception similar to the following:

This Policy specifically excepts from coverage any mechanic's liens arising as a result of the insufficiency of loan funds, owner's equity, or any and all other sources of funds in an amount sufficient to pay the full amount of the construction costs associated with the improvements being made to the insured property pursuant to a construction contract dated \_\_\_\_\_, 2013 with \_\_\_\_\_.

In addition, this Policy specifically excepts from coverage any mechanic's liens arising as a result of the lender's failure or refusal, for whatever reason, to fully disburse the loan proceeds.

### **Mechanic's Lien Endorsements**

The ALTA 32 series endorsements are specifically designed for use in situations where the priority of the lien of an insured mortgage or deed of trust does not have absolute priority over potential mechanic's liens and where you will be reviewing draw requests and disbursement records whether or not you are acting as the disbursing agent. The coverage afforded by the ALTA 32 series is significantly more limiting in the lien coverage provided than any other previously issued ALTA product. The endorsements are intended to avoid the potential of having a Loan Policy operate as a payment bond.

Additionally, a separate endorsement, ALTA 33, has been specifically designed as a date down endorsement for use in the disbursing process. Its use however, is strictly limited to situations where one of the ALTA 32 endorsements is also being utilized.

#### **A. ALTA 32 Series**

There are currently three versions of the ALTA 32 which are available. If you are not acting as the disbursing agent or are not otherwise reviewing draw requests and disbursement records then none of the ALTA 32 series endorsements should be used.

##### **1. ALTA 32.06 (Loss of Priority Construction Loans)**

The ALTA 32-06 endorsement provides coverage for an advance **only** to the extent that the charges for the services and/or materials rendered were designated for payment in the documents supporting a Construction Loan Advance and are disbursed by or on behalf of the Insured on or before the Date of Coverage.

This endorsement does not require the Company to disburse the construction funds.

**Note:** When applicable, this is the form of construction loan endorsement required by Section 3.2.C of the Department of Housing and Urban Development Federal Housing Administration Multifamily Program Closing Guide dated September 1, 2011.

2. ALTA 32.1-06 (Construction Loan – Loss of Priority – Direct Payment)

The ALTA 32.1-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers have been made by the Company or by the Insured with the Company's written approval. It also limits the coverage to liens filed for labor or materials for which payment has been made by the Company.

This endorsement requires that construction disbursements be made by the Company either making direct payments to labor and material suppliers or by specifically authorizing, in writing, that such a payment be made.

3. ALTA 32.2-06 (Construction Loan – Loss of Priority – Insured's Direct Payment)

The ALTA 32.2-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers has been made by the Insured or on the Insured's behalf on or before the Date of Coverage. It also limits the coverage to liens filed for labor or materials for which payment has been made by or on behalf of the Company or the Insured.

It does not require the Company to disburse the construction funds.

B. ALTA 33 – Disbursement Endorsement

This endorsement, which acts as a date down endorsement for construction disbursements and draws, is to be used solely in connection with the ALTA 32 series. The endorsement provides for a change to the Date of Coverage as defined in the ALTA 32 series, but does not change the Date of Policy or any other endorsements issued in connection with the policy. It also requires the insertion of any additional exceptions resulting from the title search done in connection with the issuance of the endorsement.



**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

1. Covered Risk 11(a) of this policy is deleted.
2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:
  - a. “Date of Coverage”, is [\_\_\_\_\_] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. “Construction Loan Advance,” shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. “Mechanic’s Lien,” shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic’s Lien, if notice of the Mechanic’s Lien is not filed or recorded in the Public Records, but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanic’s Lien is claimed were designated for payment in the documents supporting a

Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, material or equipment:
  - a. furnished after Date of Coverage; or
  - b. not designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

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  - a. “Date of Coverage”, is [\_\_\_\_\_] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. “Construction Loan Advance,” shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. “Mechanic’s Lien,” shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - d. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - e. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - f. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic’s Lien if notice of the Mechanic’s Lien is not filed or recorded in the Public Records, but only to the extent that direct payment to the Mechanic’s Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic’s Lien is claimed has been made by the Company or by the Insured with the Company's written approval.

4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, material or equipment:
  - a. furnished after Date of Coverage; or
  - b. to the extent that the Mechanic's Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

Attached to Policy No. \_\_\_\_\_

Issued by

**BLANK TITLE INSURANCE COMPANY**

1. Covered Risk 11(a) of this policy is deleted.
2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:
  - a. “Date of Coverage,” is [\_\_\_\_\_] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.
  - b. “Construction Loan Advance,” shall mean an advance that constitutes Indebtedness made on or before Date of Coverage for the purpose of financing in whole or in part the construction of improvements on the Land.
  - c. “Mechanic’s Lien,” shall mean any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
  - b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
  - c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic’s Lien, if notice of the Mechanic’s Lien is not filed or recorded in the Public Records, but only to the extent that direct payment to the Mechanic’s Lien claimant

for the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed has been made by the Insured or on the Insured's behalf on or before Date of Coverage.

4. This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) by reason of any Mechanic's Lien arising from services, labor, materials or equipment:
  - a. Furnished after Date of Coverage; or
  - b. To the extent that the Mechanic's Lien claimant was not directly paid by the Insured or on the Insured's behalf.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

By: \_\_\_\_\_  
Authorized Signatory

**ENDORSEMENT**

**Attached to Policy No. \_\_\_\_\_**

**Issued by**

**BLANK TITLE INSURANCE COMPANY**

1. The Date of Coverage is amended to \_\_\_\_\_.

[a. The current disbursement is: \$ \_\_\_\_\_ ]

[b. The aggregate amount, including the current disbursement, recognized by the Company as disbursed by the Insured is: \$ \_\_\_\_\_]

2. Schedule A is amended as follows:

3. Schedule B is amended as follows:

[Part I]

[Part II]

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

**BLANK TITLE INSURANCE COMPANY**

**By: \_\_\_\_\_**

## **Reverse Mortgages**

With an increasingly larger population of senior citizens, reverse mortgages are becoming more popular than ever as a way for eligible borrowers to obtain a lump sum payment, line of credit or annuity stream based on the equity available in their primary residence. Although title agents who close reverse mortgages do not necessarily need to know all the details of how the various reverse mortgage products work and are underwritten, a basic knowledge of this type of loan and the issues that may arise while processing and closing them is essential to avoid common pitfalls.

### **What is a Reverse Mortgage?**

#### **A. Purpose of a Reverse Mortgage**

Generally, the purpose of a reverse mortgage is to allow senior citizens, who are often on a fixed or limited income, to use the equity in their primary residences as a source of cash without having to pay it back as they would with a traditional mortgage or home equity line of credit. Loan proceeds are used for anything the homeowner desires, from home repairs to funding a long-term care plan to creating an income stream to supplement pension or social security payments. These loans are also marketed as providing seniors with a way to remain in their homes for as long as they want without having to worry about paying back any of the borrowed funds. The amendments to the reverse mortgage statute enacted as part of the Housing and Economic recovery Act of 2008 authorized their use for the purchase of a one-four family dwelling where the borrower will occupy one unit as a primary residence.

#### **B. Features of a Regular Mortgage**

##### **1. Increasing Equity**

Most people are familiar with a regular (forward) mortgage where the borrower is obligated to repay the loan over a set period of time at either a fixed or adjustable interest rate. The maximum amount that can be borrowed is based on the amount of equity in the property being used as collateral for the loan, commonly known as the loan-to-value ratio (“LTV”). The maximum LTV will vary from lender to lender and among the various loan programs offered by the lender. The lower the LTV, the more equity that is still in the property after the loan is made and the less risk there is to the lender that it will not recoup the full amount of the loan and associated costs in the event of a foreclosure. Assuming the value of the property does not decrease over time and that the loan is not a negative-amortization loan where the borrower is permitted to make payments equal to less than the amount of interest that has accrued on the loan each month, the amount of equity will increase over time as the principal balance of the loan decreases.



## **2. Qualification of Borrower**

Qualifying borrowers for forward mortgages is based on a combination of the value of the property being used as security for the loan and the ability of the borrower to repay the loan. The process of determining whether the borrower will be able to repay the loan in accordance with the terms of the desired program and whether the lender will lose money in the event of a foreclosure is called “underwriting” the loan. The borrower has to fill out an application and provide information about his or her employment, assets, debts and other financial obligations. Some programs or borrower situations require more information than others. Lenders may require a minimum FICO credit score and/or a smaller LTV in order for the borrower to receive the most favorable interest rate available. Typically, the lender orders an appraisal of the property to determine its current fair market value. This information is processed by the lender and a decision is made as to whether to make the loan, for how much and on what terms.

## **3. Repayment Options**

One of the most important terms of a loan is the repayment obligation. Forward mortgage loans can come with a variety of repayment options. Probably the most popular option is the fully-amortized loan where the borrower pays all of the accumulated interest and enough principal each month so that the loan is completely paid off in a certain period of time, often thirty years for a conventional mortgage. If the interest rate is fixed for the life of the loan, the monthly payments will be fixed, but if the interest rate varies, the payments may also vary, particularly if the interest rate increases during the course of repayment. Another common repayment option is the balloon payment where some or the entire principal together with accumulated interest is due on a specific date. Some balloon payment loans require that interest or interest and some principal be paid every month while others may not require any payments at all until the entire balance is due. Finally, some loans may be demand loans where repayment is made upon the demand of the lender. Demand loans are not common in residential transactions, particularly not with institutional lenders.

### **C. Features of a Reverse Mortgage**

#### **1. Equity**

Reverse mortgages are also based on the equity available in the borrower’s real property. However, unlike a forward mortgage, where the goal of the lender (and usually the borrower) is to have the amount of equity in the property increase over time, with a reverse mortgage, equity often decreases over time. The reason for this is that a reverse mortgage generally does not have to be paid back unless the borrower dies, sells the property or ceases to use the property as his or her primary residence. Since the outstanding principal balance continues to accrue interest even though no payments are being made, the amount the borrower owes to the lender increases as time passes unless all or a portion of the amount advanced is repaid. While the value of the property may also increase over time, unless the annual increase is greater than the annual

accumulated interest, each year, the borrower will have less equity in the property. However, reverse mortgages are non-recourse, meaning that the borrower can never owe more than the property securing the loan is worth. If, at the time of repayment, the amount owed is less than the value of the property, the borrower (or his or her heirs/estate) will receive the difference.

## **2. Qualification of Borrower**

Because a borrower under a reverse mortgage does not have to make monthly payments, on the loan, it is generally not as difficult to qualify for a reverse mortgage as it is for a forward mortgage. No monthly payments means that the borrower's income is far less important for a reverse mortgage, although property taxes, homeowner's insurance, repairs and maintenance of the property will still be required. The main criteria for obtaining a reverse mortgage are the age of the borrower and ownership and value of the property. Many reverse mortgage programs require the borrower and all persons on title to the property to be at least 62 years old. In addition, the borrower must either own property being used as collateral or have a very long-term lease. Finally, the property must be the principal residence of the borrower.

The amount the lender is willing to lend will, of course, depend heavily on the fair market value of the property. Due to the high potential for negative amortization over the life of the loan, the initial LTV for a reverse mortgage will be much lower than for a forward mortgage. As will be discussed later, many reverse mortgages are issued in connection with programs created by the federal government and the amount of the loan will be determined in accordance with a fixed maximum loan amount or a designated formula.

## **3. Repayment Options**

Unlike a forward mortgage, there are limited repayment options for a reverse mortgage. Basically, the loan must be repaid in full (principal plus all accumulated interest) upon the death of the borrower, the sale of the property or once the property is no longer used as the borrower's principal residence for twelve consecutive months. Usually, the loan will provide for a grace period for repayment upon the death of the borrower to give the borrower's family or personal representative time to sell the property or refinance the loan. If there is more than one borrower, payment is due on the death of the last eligible borrower or when no borrower uses the property as his or her principal residence. The borrower does have the right to cease occupying the property as his or her principal residence for up to a year in the event he or she must temporarily reside in a nursing home or assisted living facility.

## **4. Drawbacks**

Despite all their apparent benefits, reverse mortgages do have some drawbacks aside from the fact that they are only available to persons over 62 with significant equity in their home. The one drawback that will be most obvious to the title closer will be the higher closing costs. Some of the more common closing costs will be discussed in the next section when specific

types of reverse mortgages are discussed. Other drawbacks, which are more of a concern to the borrower's legal or financial advisor are that it is possible that the borrower's financial needs could ultimately exceed the amount that is available to them through a reverse mortgage, the tax deduction for the interest accruing on the loan is not immediately available, and the risk that the borrower will be pressured into entering into a reverse mortgage when it is not the right product for their particular needs. The effect of these drawbacks can be minimized with pre-loan counseling, which is mandatory for federal reverse mortgage products.

#### A. Home Equity Conversion Mortgage

The Home Equity Conversion Mortgage ("HECM") is probably the most well-known and most popular reverse mortgage product available at the present time. The key feature of the HECM is that it is insured by the federal government through the Federal Housing Administration ("FHA"), which is a branch of the United States Department of Housing and Urban Development ("HUD"). What this means is that, in the event that the lender is unable to make payments to the borrower under the terms of the loan at any time, HUD will make the payments to the borrower in place of the lender. As one can imagine, HECMs are heavily regulated, but they are available in all 50 states, as well as in the District of Columbia and Puerto Rico. The statutory authority for the insurance of HECMs is found in **12 USCA § 1715z-20**. The Housing and Economic Recovery Act of 2008 ("HERA") increased the loan limits for HECMs and, for the first time, authorized the use of reverse mortgages for the purchase of a residence. Regulations governing HECMs are found in 24 CFR Part 206.

##### 1. **Loan Amount and Limits**

One aspect of the HECM that is subject to regulation is the loan amount available to the borrower. There are three factors that will determine the amount that the borrower can obtain with a HECM. These are the age of the borrower(s), the value of the property and the current interest rates at the time of the closing. Generally, the older the mortgagor, the more money he or she can borrow. If there are multiple borrowers, then the age of the youngest borrower will be used. Obviously, lower interest rates will allow the borrower to obtain a larger loan. Finally, the more the property is worth, the greater the available proceeds. Despite this last factor, there is an overall limit for HECM reverse mortgages, known as the "203b limit" (so named for the subsection of the National Housing Act that created the restriction, codified at **12 USCA § 1709(b)**). The 203b limit varies from year to year. If the borrower's property is worth more than the area's 203b limit, then the amount of proceeds available will be based on the 203b limit as opposed to the value of the property. If the value of the property is less than the 203b limit, then the property value will control the amount of loan proceeds available. The figure that is the lesser of the appraised value of the property or the 203b limit is known as the "maximum claim amount," and this figure will play an important role in insuring the mortgage and determining the documentary stamp taxes to be paid on recording.

## 2. Counseling Requirement

Another feature of the HECM program is the requirement that the borrower(s) receive pre-closing counseling from an approved provider. The counselor must be trained to provide the counseling and cannot be involved (directly or indirectly) in the origination or funding of the loan nor be associated with the sale of any type of insurance or financial product, such as securities, investments or long-term care insurance. Counselors cannot be compensated by those who are directly or indirectly involved in these activities either. According to **24 CFR 206.41**, it is the responsibility of the lender to provide the borrower with a list of names and addresses of approved counselors.

## 3. Payment Options

The borrower has several payment options available with a HECM. These options are described in **24 CFR 206.19**. The first option is called the “term” plan. Under the term plan, the borrower receives equal monthly payments for a fixed period of time. A second plan is called a “tenure” plan, where the borrower receives equal monthly payments for as long as he or she lives and resides in the property as his or her primary residence. The third option is a credit line, which the borrower can draw on anytime he or she chooses until it is exhausted. The credit line may grow over time as the borrower ages (and his or her life expectancy drops). Two hybrid plans are also available. Modified tenure combines the tenure plan with a line of credit while modified term combines a term plan with a line of credit. In each of these hybrid plans, the fixed payments are smaller than they would be under the basic tenure or term plan to create a surplus to fund the line of credit. It is also possible to receive a single lump sum payment. The borrower has the option to change the plan during the life of the loan (see **24 CFR 206.26**).

## 4. Costs

All the flexibility and regulation that goes with a HECM is coupled with an increase in costs over a regular, forward mortgage. However, there are limits on certain costs associated with a HECM and nearly all of them can be “financed,” that is, paid out of the loan proceeds. A list of allowable charges and fees is set forth in **24 CFR 206.31**. One of the regulated fees is the origination fee, which reimburses the lender for the cost of processing the loan application and preparing the paperwork. The origination fee cannot exceed 2% of the maximum claim amount (2% of the lesser of the property’s appraised value or 203b limit) for maximum claim amounts up to \$200,000 plus 1% of any maximum claim amount above \$200,000, up to a maximum of \$6,000. These numbers may be adjusted based on the Consumer Price Index as needed. Borrowers may also pay typical third party costs associated with closing a mortgage loan, such as an appraisal fee, credit check fee, survey fee, inspection costs, title insurance premiums, recording costs and mortgage taxes. A mortgage broker fee may be charged as part of the origination fee only for an independent broker engaged by the borrower. In addition to these fees, there will likely also be a mortgage insurance premium (“MIP”) paid at closing in addition

to a monthly MIP charge. The MIP guarantees that the loan remains non-recourse (the borrower will never owe more than the property is worth). Finally, a reverse mortgage must be serviced just like any other mortgage loan, and that costs money too. Regulations limit the servicing fee that the lender can charge. In order to fund the servicing of the loan, the present dollar amount needed to service the loan is “set aside” by the lender and is subtracted from available proceeds. All of the costs associated with getting a reverse mortgage are combined and presented to the borrower as the “Total Annual Loan Cost,” or TALC, in order to allow the borrower to compare the different reverse mortgage products in some meaningful way.

## B. Reverse Mortgage Products

There are other reverse mortgage products available besides the HECM. These include products available through private lenders and state and local government-sponsored programs. These loans, particularly those available through private lenders may have features that differ from the HECM and are not insured by FHA. State and local products may be known as “deferred payment loans,” or DPLs, and are generally short term loans used to fund home repairs. Private reverse mortgages will not be subject to HECM limitations on amount or fees. It is important to carefully review the lender’s closing instructions and the loan documents when handling a non-HECM reverse mortgage to avoid any mistakes that may result in a claim based on the insured closing protection letter.

## **Title Insurance Considerations for Reverse Mortgages**

Insuring a reverse mortgage is very similar to insuring a forward mortgage, but there are a few important exceptions. The discussion of title insurance considerations for reverse mortgages will focus on insuring the HECM since the vast majority of reverse mortgages encountered by the closing agent will be of this type. However, as mentioned above, there are alternatives to the HECM and the closing agent should pay close attention to the lender’s instructions. Any questions about insuring a reverse mortgage, HECM or otherwise, can be directed to the Underwriting Department.

### A. Property Type and Ownership Interest

#### 1. **Property Type**

The first consideration when examining title in connection with a reverse mortgage closing is the type of property which is to be used to secure the loan. For the most part, nearly all types of residential real property that can secure a forward mortgage can also secure a reverse mortgage. However, since reverse mortgages are to be used only for the borrower’s primary residence, a reverse mortgage cannot be secured by commercial property or residential property with more than four living units. A single-family home, a multi-family home of 1-4 units where the borrower resides in one unit as his or her primary residence and a condominium are all

acceptable properties for reverse mortgages. Thanks to the Housing and Economic Relief Act of 2008, cooperative apartments are also now eligible. Manufactured and mobile homes must, at a minimum, be taxed as real property to qualify.

## **2. Ownership Interest**

While most reverse mortgage borrowers own their home in fee simple, this is not the only form of ownership which qualifies for reverse mortgages. The mortgagor may also be a lessee under leasehold of not less than 99 years which is renewable or under a lease which has a remaining term of not less than 10 years beyond the maturity date of the mortgage.

Ownership by an inter vivos revocable trust is also permissible, but there are special rules regarding who signs which documents. The beneficiaries of the trust must qualify for the program at all times from loan origination through mortgage release, have the right to occupy the property as their primary residence for the remainder of their lives and they must sign the promissory note and loan agreement. The trustee signs the mortgage as the holder of legal title to the property, but does not sign the loan agreement. The lender should advise the title agent whether title may remain in the trust, as this is a loan requirement rather than a title requirement.

### **B. Restrictions on Alienation**

HECM regulations do not permit most forms of restrictions on alienation of the property by the mortgagor. Impermissible restrictions include any provision in a deed, lease, contract, declaration of restrictions, trust, option, declaration of condominium, will or similar document that attempts to cause a conveyance of the property by the mortgagor to be (i) void or voidable by a third party, (ii) subject to a right of first refusal or the consent of a third party, (iii) subject to a limit on the sales proceeds permitted to be retained by the seller, (iv) grounds for acceleration of the mortgage or an increase in the interest rate or which terminates or subjects to termination all or part of the interest of the mortgagor in the property. Notwithstanding the foregoing, the regulations do permit rights of first refusal in favor of a condominium association. The lender will need to know whether there are any restraints on alienation in the chain of title, so be certain to carefully examine all documents affecting title, including plats and Declarations of Covenants, Conditions and Restrictions.

### **C. Amount of Title Insurance**

One of the more confusing aspects of insuring a reverse mortgage, especially a HECM, is the amount of title insurance policy. For a HECM, the amount of insurance to be issued is equal to the maximum claim amount, which was defined earlier as being the lesser of the appraised value of the property or the 203b limit for the county in which the property is located. When closing a non-HECM reverse mortgage, determining the amount of insurance is not as easy. The lender will have to provide the title agent with the principal amount of the debt in writing.

#### D. Shared Appreciation

Shared appreciation occurs when the lender is given a portion (“share”) of the increase in the value of the property (“appreciation”). A HECM borrower may receive a lower interest rate in exchange for giving the lender a share of the net appreciation of the property. Shared appreciation regulations are located at **24 CFR 206.23**. Since no one can predict the future, a lower interest rate and a share in the net appreciation results in a bigger risk to the lender that any losses under the mortgage will be greater than the maximum claim amount. Therefore, when a mortgage contains a shared appreciation clause, the lender may elect to add a shared appreciation endorsement to the loan policy.

#### E. Loan Documents

While a traditional forward mortgage loan requires the borrower to sign a single promissory note and a single mortgage, a HECM loan has some additional documents that cause borrowers and closers confusion. First, there is a loan agreement, which contains many of the provisions related to how the borrower will receive the loan proceeds, set asides, changes in payment plans and mortgage insurance premiums. The promissory note consists of terms such as the borrower’s promise to repay the loan, the right to prepay, the limitation on the borrower’s personal liability and a listing of events which cause the loan to become due. The mortgage is the document recorded in the county where the property is located and places the lien on the property. HECMs will also have a second note and a second mortgage as part of the loan package. The parties to the first note and mortgage are the borrower and the lender while the parties to the second note and mortgage are the borrower and the Secretary of HUD. The second note and mortgage go into effect in the event that HUD must make payments to the borrower because the lender can no longer do so. Both notes and mortgages are executed at closing and returned with the loan package. Finally, since a lien will be placed on the borrower’s primary residence, a reverse mortgage is subject to a 3-day right of rescission and each borrower and his/her spouse (even if the spouse is not on title and not a borrower) must sign a rescission notice.

#### F. Issuing the Policy and Endorsements

##### 1. **Preparing the Policy**

Preparing a policy for a reverse mortgage is similar to preparing one for a forward mortgage in most respects, but there are several key differences that bear mentioning. First, the policy will insure only the first mortgage executed in favor of the lender. However, the insured may be listed as “\_\_\_\_ [Lender] \_\_\_\_\_, and/or the Secretary of Housing and Urban Development, and his or her successors and/or assigns.” The second recorded mortgage must be listed as a subordinate matter on Schedule B-II of the final policy. The insurance amount for a HECM will be the maximum claim amount (as defined above). The insured mortgage must be in first lien position.

## **Endorsements**

### **a. ALTA 14.3 Reverse Mortgage Endorsement**

The ALTA 14.3 is the Reverse Mortgage Endorsement. The purpose of the endorsement is to insure the lender that their mortgage will remain in first lien position regardless of changes in the interest rate, negative amortization or the making of future advances in connection with the loan. It also insures against lack of compliance with certain requirements for reverse mortgages, such as the failure of mortgagors to be age 62 or older.

### **b. Shared Appreciation Endorsement**

Reverse mortgage loans with a shared appreciation feature may require a shared appreciation endorsement, including the new ALTA 30-06 1-4 family residential shared appreciation endorsement. “Shared Appreciation” is a defined term in the endorsement which means “increases in the Indebtedness secured by the Insured Mortgage by reason of shared equity or appreciation in the value of the Land.”



## Federal Receiverships

In addition to any receivership options that may or may not be available under state law, federal law also allows for property to be sold or foreclosed under a federal receivership scenario. A federal receivership offers a relatively quick and efficient means for a lender to foreclose on its collateral especially when that collateral is located in multiple states. Although a uniform Model Commercial Real Estate Receivership Act is being discussed, currently there is no uniformity in the various receivership statutes available on a state level.

Federal receiverships offer a number of advantages over the state foreclosure process. For example, a federal receivership provides one forum for transactions where the secured property is located in more than one state thus eliminating the need to conduct multiple foreclosures. Additionally, one of and perhaps the biggest advantage to using a federal receivership to foreclose a mortgage is that, under 28 U.S.C. §2001(b) there is no right of redemption.

Although federal receiverships offer a number of advantages and are becoming more and more prevalent, strict compliance with the federal statutes involved is required. While all transactions involving such foreclosures or sales out from such a foreclosure need to be approved by MVT, what follows is a checklist of the necessary steps:

### **Checklist**

1. Determine if the Appointment Order was filed with the District Court in each district where property being sold is located and, if so, if it was filed within 10 days of the date of the Order.
  - a. See, 28 USC § 754
2. Determine if there is complete diversity between the parties, i.e. no single plaintiff is from the state as a defendant.
  - a. See, 28 USC § 1332
  - b. Diversity issues regarding LLCs and Partnerships –
    - i. Need to look at the location of all members and partners.
    - ii. If a member or partner is another LLC or Partnership, need to look at the location of each of those individuals.
      1. See, Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990)
  - c. Diversity issues regarding corporations –
    - i. Look at state of incorporation and principal place of business
      1. Principal place of business is determined by the location of the “nerve center” of the business. See, Hertz Corp. v. Friend et al., 559 U.S. 77, 130 S. Ct. 1181, 175 L.Ed.2d 1029 (2010).

3. Determine if the amount in controversy is at least \$75,000.00
  - a. See, 28 USC § 1332
4. Determine if all parties with a lien interest in the property, as shown by the Title Commitment, have been given proper notice.
5. Determine if 30 day appeal period has run from the date of the Order Confirming the Sale with no appeals having been filed.
  - a. See, 28 USC § 2001 and Federal Rules of Appellate Procedure Nos. 3 and 4
6. Review the Deed(s) from the Receiver
  - a. Do they recite the venue and authority of the receiver;
  - b. Do they specifically indicate that the property is being sold free and clear of liens.
7. File a certified copy of the Order along with the Deed(s).

## ENDORSEMENTS and FORMS

Endorsements are attachment pages that are used to amend or modify a policy for a variety of reasons. They may be used to make routine corrections in spelling or in other information typed in the policy, or they may be pre-printed forms which address specific issues or provide certain coverages. The forms used for these purposes are discussed in the following pages. These are mostly standard forms adopted by the American Land Title Association and commonly referred to by their ALTA number, which as of the December 2014 revisions run from 1 through 45.

There are also a number of non-standard endorsements which may be requested by parties in both residential and commercial transactions. Not all of these are appropriate or in proper form. This company is unwilling to issue some of them. Many of these are presented in a prepared format which suggests they may be in regular use in other areas, which can be misleading. Additionally, just because a form is issued by a competitor does not necessarily mean it is a standard form.

"Affirmative coverage" generally refers to the practice of insuring over known risks. It can be a relatively routine practice, such as issuing a standard ALTA endorsement (contact your supervisory office for guidelines on what is considered a "standard" endorsement). It can also represent assuming a higher risk, but still within the bounds of what is considered to be fairly common practice, such as insurance against loss or damage resulting from a future claim to force the removal of an improvement that encroaches onto an easement. Affirmative coverage may also represent a very high risk practice, such as deleting a policy Exclusion, Condition, or other boilerplate policy provision. *Any affirmative coverage other than that considered to be routine requires supervisory office approval.*

If you are asked to issue an endorsement which is not one of the forms covered in this manual, do not agree to provide it without prior approval from your supervisory office. Also note that wherever special endorsement language is used or a non-standard endorsement is given, it should include as the final paragraph the following language:

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

When issuing endorsements, you must exercise care to ensure compliance with state rate, filing and use requirements, where applicable. When reinsurance is required either at the request of the insured or due to the transaction's size, all requested and issued endorsements must be disclosed

to the reinsurer. It is important to note that some of the requested endorsements may require payment of additional reinsurance risk premium.

### **Post-Policy Endorsements**

Policies may be amended or modified at any time after the original policy was issued. However, care must be exercised when doing so, particularly if the policy or any coverage in it is being extended to a later date. Some endorsements state the nature of the required change, correction or deletion but specifically state that the policy date and coverage are not changed. Changing the effective date is usually referred to as "down-dating," and is considered to be a high risk practice requiring that the chain of title and all other searches be brought current. It is generally not appropriate for owners' policies and may be contrary to state law or rate filings. In some cases, extending the policy date may not be done unless the insured pays an additional premium. This is particularly true when a loan is amended or modified and an endorsement reflecting the amendment or modification is issued.

### **Identification on Endorsements**

Whenever an endorsement is issued after a policy has been delivered, the endorsement should make reference to the original transaction so that the insured will be able to easily match the endorsement with the policy to which it is to be attached. Also, below the countersignature of the Authorized Officer or Agent, type: Name and address of issuing agent.

## **ALTA Endorsements 1-45**

### **ALTA Form 1-06 - Street Assessments**

The ALTA 1-06 Endorsement insures a lender against loss as a result of an assessment for street improvements under construction or completed at date of policy, which may gain priority over the lien of the insured mortgage. The coverage afforded by this particular endorsement is included in the 2006 ALTA Loan Policy, at Covered Risk 11(b) which makes this endorsement no longer necessary. Our only reason for including it here is to give you the full sequence of ALTA numbered endorsements for your reference. If you have any questions about the form, please contact your supervisory office.

### **ALTA Form 2-06 - Truth in Lending Endorsement**

The ALTA 2-06 Endorsement insures a lender against loss resulting from a determination that the lien of the mortgage has been terminated, or the title acquired by the lender (in foreclosure) has been defeated by a valid exercise of the right of rescission pursuant to the Federal Truth-in-Lending Act, and that the right of rescission existed because neither the credit transaction nor the right of rescission was exempted or excepted by Regulation Z. The general provisions and other implications of that Act, as well as its effect on loan closings are discussed in the "Truth-in-Lending Act" portion of the "Federal Consumer Credit Protection Act" chapter of this manual.

The major thrust of the endorsement is to insure against termination of the lien of the insured mortgage or loss of title to the security resulting from the right of the borrower to rescind. Note, however, that the coverage is limited to the insured mortgage being "exempted from" or "excepted to" as regards the consequences of the Act.

An exemption comes from it being a "business or commercial" transaction as opposed to a consumer loan. An exception arises from the transaction being a "first mortgage loan on residential property." Since these are the only circumstances under which the endorsement can be issued and given that these circumstances are so easy to ascertain, most lenders have been unwilling to pay the applicable fees for an endorsement to tell them what they already know. As a result, the endorsement has seen very little actual use.

### **ALTA Forms 3-06, 3.1-06, and 3.2-06 - Zoning Coverage**

The impact of government regulations, including building and zoning ordinances, are specifically excluded from coverage under our standard Owner's and Loan policies pursuant to Paragraph 1(a) of the Exclusions From Coverage section. The ALTA 3-series of endorsements provides assurance that the land described in the policy is zoned in a specific classification, and lists one or more of the uses allowed in that classification.

The ALTA 3-06 is used for vacant land or land where construction is currently taking place. The ALTA 3.1-06 is used only for land with completed structures and the ALTA 3.2-06 is intended for use in an ongoing or contemplated construction project in which improvements have not yet been completed, but for which the title insurer has been provided existing plans and specifications which depict the contemplated improvements. The 3.1-06 and 3.2-06 also affirmatively insure that the improvements comply with the zoning classification regarding use, building site dimension, floor space, setback, height, and parking. The coverage afforded by the 3.2-06 is identical to that afforded by the 3.1-06 except that the effectiveness of the coverage is limited by the requirement that "Improvements" (as that term is defined in Section 1(a) of the Endorsement) be constructed according to the Plans identified in Section 1(b) of the Endorsement.

The ALTA 3 endorsements offer limited affirmative coverage. You will want to make an appropriate charge in order to compensate yourself for your time (which in many states is governed by a rate filing or regulation). Additionally, we want to limit coverage as much as possible. Some investors will request that we insure against loss or damage by reason of the existence of zoning ordinances. Others will ask us to insure that the zoning ordinances have been complied with. Refuse to give broad assurances such as these. Such broad assurances could put us in the position of guaranteeing that the building code has been complied with, if the ordinance happens to also contain such a code. Rather, you should offer *only* the form ALTA 3-06, the 3.1-06, or the 3.2-06 unless you have written approval to do otherwise. Also, there are certain states which do not permit title insurers to issue zoning endorsements. You should be aware of your state's position in this matter.

Before giving such coverage, please secure approval from your supervisory office.

### **ALTA Forms 4-06 and 4.1-06 - Condominium Endorsements**

ALTA Form 4-06, insures a lender securing its loan with a mortgage lien on a condominium unit that (i) the unit is part of the condominium; (ii) the condominium documents comply with state requirements; (iii) there are no violations of restrictive covenants, and any violations of the covenants will not cause a forfeiture or reversion of title; (iv) the mortgage has priority over liens for charges and assessments; (v) the unit will be assessed for real property taxes as a separate parcel; (vi) there is no obligation to remove any improvements due to encroachments; and (vii) there has been no prior right of first refusal which could defeat the title. Additionally, Item 4 in this endorsement provides specific assurance to the lender against the priority of any charges or assessments provided for in either the condominium statutes or the condominium documents having priority over the insured mortgage.

The 4.1-06 endorsement is virtually identical in form to the 4-06, but since it removes any references to the "Insured Mortgage" it is primarily intended to be used in connection with an Owner's Policy.

Under both versions of the endorsement, the various insuring provisions are stated in a direct fashion by number. Most condominium developers are aware of lender requirements and will have set their projects up to meet these conditions. To give the coverage, you must be sure that the condominium documents, the declaration or the master deed, as well as the individual deeds, comply with your state laws on the subject so as to meet Endorsement Items 1 and 2. Endorsement Items 3 and 6 parallel the coverage given on individual houses as to restrictions and survey matters. Item 4 requires an examination of the documents to determine the truth and applicability of this statement and Endorsement Item 5 requires a checking of the appropriate local tax records.

Endorsement Item 7 requires a check to see if a "right of first refusal" is given and if any prior sales, including the one you are insuring, have been handled so as to recognize and deal with the terms of such a right.

**NOTE:** In states where a Homeowner's Association Lien will take priority over a previously recorded mortgage, the 4.1-06 endorsement should be used as it provides coverage at Endorsement Item 4 for "any charges or assessments provided for in either the condominium statutes or condominium documents due and unpaid at Date of Policy." Prior to issuing this endorsement, you must ensure that the lender has priority as of the date of the policy and that there is no amount due or a lien in existence for homeowners' association charges.

### **ALTA Forms 5-06 and 5.1-06 - Planned Unit Development Endorsements**

ALTA Form 5-06 insures a lender securing its loan with a lien on a unit in a PUD that: (i) there are no violations of restrictive covenants, and any violation of the covenants will not cause a forfeiture or reversion of title; (ii) the mortgage has priority over liens for charges and assessments by any homeowners' association; (iii) no existing structure will have to be removed because of any encroachments; (iv) there has been no prior right of first refusal which could defeat the title. This endorsement is intended for use in states where PUD homeowners' association liens have super priority status. The 5-06 ensures that the lender has priority only at the date of policy and that there is no amount due or lien in existence for homeowners' association charges.

Endorsement 5.1-06 is virtually identical in form to the 5-06, but since it removes any references to the "Insured Mortgage" it can also be used in connection with an Owner's Policy. Additionally, PUDs are characterized by common or membership ownership of common areas. The policy should follow the record title as to those features and include those interests that are included in the deed. In addition to setting out the restrictions, proper exception must be taken in Schedule B to the regulations of any homeowner's association, the right to levy assessments and the rights of others in common areas as well.

The endorsements contain four insuring provisions, several of which require your special attention. Endorsement Item 2 requires a review of the documents to determine if provision is made for the priority of the insured mortgage over any assessment liens for the homeowner's association. Knowledge of the law in your state is also necessary as in some states, there are "super-priority" statutes providing that Homeowner's Association liens take priority over previously recorded mortgages, in which case the ALTA 5.1-06 must be used.

The coverage in Endorsement Item 3 is similar to the coverage provided on a regular single family residence and Endorsement Item 4 requires a check to see if there is a "right of first refusal" affecting the current or any prior sales.

### **ALTA Forms 6-06 and 6.2-06 - Variable Rate Mortgage Endorsements**

The ALTA 6 endorsement series insures the lender against the invalidity, unenforceability, or loss of priority of the lien of the insured mortgage as a result of changes in the rate of interest, interest on interest, or increases in the unpaid principal balance of the loan resulting from the addition of unpaid interest pursuant to a formula provided for in the insured mortgage.

There are certain minimum underwriting requirements for mortgages of this sort to be eligible for these endorsements. First, the recorded mortgage should clearly reflect, by its language, or a rider, that it is to be a variable rate mortgage. Second, it should show the initial rate of interest. Third, the changes in the rate should be tied to a published, verifiable index which is outside the control of the lender.

In most states, these mortgages may be made without restriction or limit. In some states, however, such mortgages may not be allowed unless the lender follows the specific format and

requirements of a federal loan program or a particular state statute. You must be sure that these requirements are met.

The 6.2-06 Endorsement is designed to be used in certain loan programs that contain periodic limits or caps on the amount by which the monthly payments on the loan can be increased. The stability offered by such limits is of great interest to many borrowers. However, if the index moves upward enough, it is possible that the limited monthly payment may not be large enough to pay all of the interest. The loan documents provide that, in such cases, this unpaid interest is to be added to the unpaid balance which will then draw interest at the applicable rate. Because the charging of "interest on interest" is not permitted in a number of states, use of the ALTA 6.2-06 is limited to those states in which "interest on interest" is legal.

Since there is a good possibility that the principal balance of the loan may actually increase substantially over its original amount as a result of the addition of unpaid interest, lenders are concerned that the insured amount is high enough to cover the negative amortization aspects of the loan. In order to be sure they have adequate coverage, many lenders request a policy in a larger amount. It is proper for you, in such cases, to write the policy in a larger amount than the face amount of the mortgage. You should charge and collect the premium which is appropriate for the amount of the policy. In FNMA loans, the lender will not let the balance go over 125% maximum. When these mortgages are intended for FNMA, they will always be written for and charged at the 125% figure.

In another related development, some lenders and FNMA programs offer variable rate loans which, at a certain point and for certain times, are convertible to fixed rate loans. These lenders want endorsements which cover these loans as well. There is no ALTA form and an alteration to the applicable 6 series endorsement is needed. To do this, put an asterisk after the last sentence in the numbered paragraph 1 of the ALTA 6-06 or 6.2-06. Put a second asterisk in a blank space below and add the words "or provisions which provide for conversion to a fixed rate of interest."

The ALTA 6 series endorsements have been largely replaced by the ALTA 14 series endorsements, *infra*, which also provide coverage over changes in the rate of interest.

### **ALTA Forms 7-06, 7.1-06 and 7.2-06 - Manufactured Housing Unit Endorsements**

The ALTA 7 series endorsements are designed to assure owners and lenders that the housing unit is part of the real estate. These units presently range from what we have been taught to call "mobile homes" up to homes assembled from as many as three component sections, all of which, on their own, approach maximum highway size; and, once assembled, are impractical to move again.

The test, in insuring these, is whether or not they have become so affixed as to become a part of the real estate. While intent is important and meaningful, affixation is a fact situation. Any wheels, undercarriage or draw-bar must be removed. The unit should be on a permanent foundation. Because of design features, these foundations may be concrete piers rather than a



continuous block-wall. Whatever system is used, it should reflect permanence and a firm attachment to the site. Utilities and sewer should be hooked to permanent connections.

In states where titles and registrations can be surrendered and taxes assessed as realty, steps should be taken to accomplish this. If a title cannot be surrendered, it may be wise to consider recording any mortgage to be insured as both a chattel and a real estate filing.

In the case of any new units coming on to the property, you should examine the certificate of title, the chattel filings or UCC recordings to find any prior liens on the unit itself. These must be released, or else an exception taken to them on the title policy.

Each of the ALTA 7 endorsements defines the term “Land” as including the manufactured housing unit. This means we are insuring against any prior liens holding over from its existence as a chattel. Since intent is significant, it is recommended that you get a statement that the owner intends to attach it permanently to the lot and not move it again. If requested to do so, you may include the serial number or other identification number from the unit in the legal description in Schedule A.

The ALTA 7-06 is applicable for either an Owner or Loan Policy while the 7.1-06 is applicable only for a Loan Policy and the 7.2-06 is applicable only for an Owner’s Policy. Both the 7.1-06 and the 7.2-06 provide coverage to an Insured as to any lien which has attached to the manufactured housing unit as personal property, including:

- (i) a federal, state or other governmental tax lien;
- (ii) a UCC security interest;
- (iii) a motor vehicle lien; or
- (iv) other personal property lien.

In addition, the 7.1-06 endorsement specifically provides a lender with coverage in the event that:

*The lien of the Insured Mortgage is not enforceable against the Land in a single foreclosure proceeding.*

This additional lender assurance contained in the 7.1-06 is important. The definition of Land in section 1(i) of the Conditions includes the Land described in Schedule A, and ***affixed improvements that by law constitute real property***. This language provides an indemnification to a lender who commences a foreclosure proceeding against the land and the manufactured housing unit in a single land foreclosure proceeding, only to learn the manufactured housing unit must be foreclosed in a separate proceeding.

In order to provide the coverage contained in the 7.1-06 and 7.2-06, it is necessary to extend your search beyond the public land records. Indemnification against motor vehicular liens requires a determination as to whether a certificate of title has been issued for the manufactured home. If so, the certificate must be surrendered and examined to determine if any vehicular liens are noted thereon. If a lien is found to exist, it must be released prior to closing.

In addition, a determination needs to be made as to whether any UCC security interests have been granted. This entails a much more complicated search. You would need to know the chain of title to the manufactured home since its creation and the state of residence (if an individual) or state of creation or principal place of business of the owner (if the owner is an entity). This information requires a search of the records of the Secretary of State in whichever state is the state of residence or creation.

Given the difficulties in accessing and searching the non-real estate records necessary in order to issue these endorsements, approval of state counsel in consultation with Corporate Legal Department is required.

### **ALTA Forms 8.1-06 and 8.2-06 - Environmental Protection Lien Endorsements**

ALTA endorsement form 8.1-06 insures a residential lender against loss of priority due to (i) a federal or state environmental protection lien filed in the public records as defined in the endorsement at the date of policy, and (ii) an environmental lien provided for by a state statute (super lien) in effect on the date of policy, but excepting those statutes listed in paragraph (b) of the endorsement. Both Fannie Mae and Freddie Mac require a statement that no environmental protection liens have been recorded on loans they purchase from institutional mortgage lenders. Because of the ultimate uncertainty as to which loans will ever end up in Fannie Mae or Freddie Mac, many lenders will require the endorsement as a matter of course. Consequently, you may have to issue the 8.1-06 endorsement on a routine basis.

The 8.1-06 endorsement is only applicable to loan policies where the land is used or intended to be used primarily for residential purposes, including multi-family apartment projects. The endorsement should not be issued where the land is not used or to be used primarily for residential purposes (e.g. industrial property, commercial property, farms and ranches). Further, this endorsement may not be given to an owner.

The endorsement has two insuring provisions:

Paragraph (a) of the endorsement insures that there have been no environmental protection liens recorded in records within the scope of your present search and in the records of the United States District Court for the district in which the land is located.

Paragraph (b) of the endorsement requires completion by you. In paragraph (b) you must show state statutory provisions creating a super lien or providing for recording of liens in records other than those presently searched for purposes of issuing policies. If there are no such state statutory provisions, the word "None" should be inserted to complete paragraph (b).

If you are unsure as to what should be shown in paragraph (b), please seek advice from your supervisory office.

The 8.2-06 may be used in connection with either a Loan or an Owner's Policy and provides assurance in commercial transactions against the existence of any **recorded** federal or state environmental protection liens not otherwise shown as an exception in Schedule B. Since this endorsement is strictly limited to matters of record, the existence of any state statutes creating a "super lien" are immaterial.

**NOTE:** Whether issuing an 8.1-06 or an 8.2-06, whenever your search reveals an environmental protection lien, the lien must be shown as an exception in Schedule B of the policy. No affirmative coverage may be given for any filed environmental protection liens.

### **ALTA 9 Series Endorsements**

The ALTA 9-series endorsements have been completely revamped in response to the Nationwide Life Insurance Company case as well as comments from people within the industry. There are now seven ALTA 9 endorsements available: 9-06, 9.1-06, 9.2-06, 9.3-06, 9.6-06, 9.7-06, and 9.8-06. Note, the 9.4-06 and the 9.5-06 have been withdrawn and to avoid confusion, those form numbers are not being reused.

The revamped ALTA 9 series has eliminated the provisions that led to the decision in Nationwide, i.e. Section 1(b)(2), and inserted a revised version of that coverage into the new ALTA 9.6-06. In addition, the former Section 2 coverage for encroachments and minerals has been eliminated in the revised 9.1-06 through 9.3-06 endorsements.

The ALTA 9 series endorsements insure over certain matters specified on the face of the endorsements, unless matters are "expressly excepted in Schedule B." This means for items not to be covered by the endorsement they must be specifically excepted in Schedule B. Case law indicates that a blanket exception with a reference to a document generally (e.g., *Declaration of Conditions, Covenants and Restrictions recorded 1/1/09 at Book 123 Page 345*) will not suffice when an ALTA 9 series endorsement has been issued because those endorsements extend

affirmative and expansive coverage over restrictions, encroachments and mineral interests. Therefore, when issuing an ALTA 9 series endorsement, if exception is taken to any document of record, you must reference with precision the particular restriction, encroachment or mineral interest to which exception is being taken, and not simply except in its entirety the document containing the excepted provision. By excepting specific portions of a document, you are drawing the insured's attention to those matters not being insured, which is a necessary disclosure in conjunction with the issuance of an ALTA 9 series endorsement.

**ALTA 9-06 Endorsement (Restrictions, Encroachments, Minerals Endorsement)**

The ALTA 9-06 endorsement is intended for use on Loan Policies only. For a residential lender, it may be given in accordance with the general guidelines for survey coverage without a survey. On a commercial loan, it should never be given without a current survey or a personal inspection of the property.

This endorsement provides a lender with indemnification against any covenant which divests, extinguishes or subordinates the lien of an insured mortgage, renders the lien of an insured mortgage unenforceable, or can cause a loss of an insured lender's title after foreclosure. In addition, it also provides coverage for the following:

- a. Violations of any enforceable covenants, enforced removal of improvements because of encroachments onto setback lines shown on a plat filed of record and notice of a violation of environmental protection laws if notice of the violation is recorded in the public records;
- b. Loss as a result of encroachments of improvements located on the land insured onto adjoining land, or from adjoining land onto the land insured, any encroachment of improvements on the land onto any easement, or a court order requiring the removal from any land adjoining the insured land of an encroaching improvement from the insured land onto the adjoining land; and
- c. Damage to improvements located on the insured land, including lawn, shrubbery or trees which arise from the exercise of any easement rights or from the future exercise of mineral rights.

All such coverages are effective only if no specific exception for those items appears in Schedule B of the policy.

**ALTA 9.1-06 Endorsement (Covenants, Conditions and Restrictions Owner's Policy-Unimproved Land)**

The 9.1-06 provides limited coverage to a purchaser of unimproved real property. It indemnifies a buyer against violations of Covenants in effect at Date of Policy unless the violation is specifically excepted in Schedule B of the policy. Coverage is provided for covenants relating to environmental protection only **if** notice of the violation of the covenant is recorded in the Public Records at Date of Policy. Coverage for encroachments and minerals has been eliminated.

#### **ALTA 9.2-06 (Covenants, Conditions and Restrictions Owner's Policy-Improved Land)**

This endorsement is the owner's equivalent of the ALTA 9-06 discussed above. It provides coverage for violations of any enforceable covenants, removal of improvements because of encroachments onto setback lines disclosed on a recorded plat, and notice of a violation of environmental protection liens **if** notice of the violation is recorded in the public records. As in the 9-06, all coverages are effective **only if no specific exception for those items appears in Schedule B of the policy**. Coverage for encroachments and minerals has been eliminated.

#### **ALTA 9.3-06 (Covenants, Conditions and Restrictions-Loan Policy)**

The endorsement provides coverage to lenders for certain items of loss pertaining to Covenants. The endorsement uses the defined term "Covenant" to refer to all conditions, restrictions and covenants, generally. An insured lender is covered as to loss of priority, enforceability and validity of an insured mortgage or loss of title after foreclosure because of violation of a Covenant. The following items are also covered:

- a. Loss as a result of any current violation of a Covenant, or forced removal of an improvement as a result of an encroachment onto a setback line ; and
- b. Violations of environmental protection laws or regulations if a notice of the violation is recorded in the Public Records at Date of Policy.

All coverages provided in the endorsement are effective **only if no specific exception for those items appears in Schedule B of the policy**. Coverage for encroachments and minerals has been eliminated.

#### **ALTA 9.4-06 – Withdrawn and no longer available**

#### **ALTA 9.5-06 – Withdrawn and no longer available**

#### **ALTA 9.6-06 (Private Rights-Loan Policy)**

This endorsement contains two defined terms. "Private Right" is defined in Section 2. b. to mean (i) a private charge or assessment; (ii) an option to purchase; (iii) a right of first refusal; or (iv) a right of prior approval of a future purchaser or occupant. Section 3 of the endorsement provides coverage in the event that a Private Right contained in a Covenant (defined as a covenant, condition, limitation or restriction contained on a document or instrument in effect at Date of Policy) results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage or causes a loss of the Insured's Tile acquired in satisfaction of the lien of the Insured Mortgage, subject to any exceptions in Schedule B of the Policy.

Excluded in Section 4 of the Endorsement is loss arising from any covenant, condition, limitation or restriction: (a) contained in an instrument creating a lease; (b) relating to obligations to perform maintenance, repair or remediation on the Land; or (c) relating to environmental protection of any kind, including hazardous or toxic matters, conditions, or substances.

Section 4.d allows the insurer to further limit the coverage provided in the endorsement by specifically excepting any Private Right (as defined in the endorsement) for which coverage is otherwise provided by listing any Private Rights contained in an identified Exception(s) in Schedule B of the policy.

**ALTA 9.7-06 Restrictions, Encroachments, Minerals-Land Under Development-Loan Policy)**

Understanding the definitions in Section 2 is key to understanding the coverages in this endorsement and the 9.8-06. "Covenant" has the same definition as set forth for the 9.6-06, above (and in the rest of the ALTA endorsements).

"Future Improvement" is defined as "a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed on or affixed to the Land in the locations according to the Plans and that by law constitute real property."

"Improvements" means an improvement, including any lawn, shrubbery or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

""Plans" means the survey, site and elevation plans or other depictions or drawings prepared by

\_\_\_\_\_, dated \_\_\_\_\_, last revised \_\_\_\_\_, designated as

\_\_\_\_\_, consisting of \_\_\_ sheets." The first blank should contain the name of the

architect or engineer who/which prepared the Plans. The next to last blank should contain the project name or project number as designated in the Plans.

Coverage is provided as the result of the violation of any Covenant which divests, subordinates or extinguishes the lien of the Insured Mortgage, results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or causes a loss of the Insured's Title acquired in satisfaction of the Indebtedness.

Coverage is also provided as to the violation of an enforceable Covenant by an Improvement or a Future Improvement unless a Schedule B exception identifies the violation. Coverage is provided as to the enforced removal of an Improvement or Future Improvement as the result of a violation of a building setback line shown on a recorded plat of subdivision unless an exception in Schedule B identifies the violation. Coverage is provided as to a *recorded* notice of violation of an enforceable Covenant relating to environmental protection describing the Land, unless an exception for the notice of violation appears in Schedule B.

Coverage is provided as to encroachments of Improvements or Future Improvements located on the Land onto an easement located on the Land or onto adjoining Land and as to improvements located on adjoining land onto the Land. Coverage is provided as to damage to an Improvement or Future Improvement that encroaches onto a portion of the Land subject to an easement if the damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved. Coverage is provided as to damage to an Improvement or Future Improvement resulting from the right to extract or develop minerals or other subsurface substances excepted in the policy.

The endorsement excludes coverage as to loss or damage arising from (a) any Covenant contained in an instrument creating a lease; (b) any Covenant relating to obligations to perform maintenance, repair or remediation on the Land; or (c) any Covenant relating to environmental protection of any kind, including loss arising from hazardous or toxic matters, except as provided in Section 3.d. of the endorsement; (d) loss arising from contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; and (e) negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

#### **ALTA 9.8-06 (Covenants, Conditions and Restrictions-Land Under Development-Owner's Policy)**

This endorsement contains the same definitional phrases as the 9.7-06. It provides an owner of property that is being developed and for which specific Plans (as identified in Section 2.d. of the endorsement) have been provided, coverage against loss or damage caused by: a) a violation of an enforceable Covenant by an Improvement or Future Improvement, unless a Schedule B exception identifies the violation; b) enforced removal of an Improvement or a Future Improvement as a result of violation of a building setback line shown on a plat of subdivision recorded at Date of Policy; and c) a recorded notice of violation at Date of Policy of an enforceable Covenant relating to environmental protection describing the Land and referring to the Covenant, but only to the extent of the violation referred to in the recorded notice. No coverage is provided if a Schedule B exception identifies the notice of violation.

The endorsement does not cover loss resulting from:

- a. A Covenant contained in an instrument creating a Lease;
- b. A Covenant imposing an obligation to perform maintenance, repair or remediation on the Land;
- c. A Covenant relating to environmental protection, except to the extent coverage is provided as to a recorded notice of violation (described above); or
- d. Contamination, explosion, fire, vibration, fracturing, earthquake or subsidence.

It is expected that more than one of these ALTA 9 series endorsements will be requested in connection with a single policy issuance. The reformatting of the 9 series causes different versions of the endorsements to cover specific but different areas of concern to an Insured. As a result, it will not be unusual to issue more than one ALTA 9 series endorsement in a given transaction.

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

This endorsement is patterned after the 9.6-06 described above. It defines the terms "Covenant" and "Private Right" in the same manner as does the 9.6-06 (as described on page 2 of Bulletin No. 1605-12-0330). Coverages and exceptions to coverage are the same, except that the exception at Section 4.d. is not optional in the 9.9-06.

**ALTA 9.10-06 (Restrictions, Encroachments, Minerals - Current Violations-Loan Policy)**

The coverages in this endorsement are patterned after those coverages in the ALTA 9.06 endorsement. The endorsement indemnifies a lender against loss or damage arising because a violation of a Covenant (as defined in the endorsement) divests, subordinates or extinguishes the lien of the Insured Mortgage, results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or causes a loss of the Insured's Title acquired in partial or whole satisfaction of the Indebtedness.

It also provides coverage for loss or damage caused by a violation at Date of Policy of an enforceable Covenant, enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision filed in the Public Records, unless an exception in Schedule B identifies the violation. It also provides indemnification as to a violation of an enforceable Covenant relating to environmental protection recorded in the Public Records at Date of Policy, but only to the extent of the violation referred to in the Notice. If a Schedule B exception identifies the notice of violation of the Covenant relating to environmental protection, no coverage is afforded.

Further coverage is given as to encroachments of an improvement located on the Land at Date of Policy onto any portion of the Land subject to an easement or for encroachment of an improvement located on adjoining land onto the Land, unless a Schedule B exception identifies either type of encroachment. Additional coverage is provided as to a final court order requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B, or damage to an



Improvement located on the Land at Date of Policy that is located on or encroaches onto that portion of the Land subject to an easement and resulting from the exercise of the right to use the easement for the purpose for which it was granted or reserved.

Lastly, coverage is afforded for damage to an Improvement resulting from the exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land in the policy or excepted in Schedule B.

This endorsement, like several others in the 9 series, does not indemnify against loss which results from any Covenant contained in a lease, any Covenant pertaining to obligations to perform maintenance, repair or remediation on the Land, any Covenant relating to environmental protection of any kind, except those for which coverage is provided in Section 3.c., described above.

Also excepted is loss arising from contamination, explosion, fire, fracturing, vibration, earthquake or subsidence, or loss resulting from the negligence of any person or Entity exercising a right to extract or develop minerals or other subsurface substances.

The coverage in this endorsement is identical to that in the ALTA 9-06 endorsement, except that the coverage in Section 3 of the 9.10 is limited to violations existing at Date of Policy, whereas the 9-06 provides coverage for damage arising from a violation of a Covenant at any time.

#### **ALTA Forms 10-06 and 10.1-06 - Assignment Endorsements**

The ALTA 10-06 and 10.1-06 endorsements insure against loss from failure of the assignment to vest title to the insured mortgage in the insured and any partial or full reconveyance or release of the insured lien recorded in the public records.

An ALTA 10-06 is issued upon assignment of a mortgage and insures the new assignee of record against loss (1) sustained by failure of the assignment document to properly transfer title and (2) sustained by prior modifications or releases as stated in paragraph "(b)" of the endorsement, if any (if none, type "NONE").

The ALTA 10.1-06 does the same, but is used with a request for assurances regarding status of title from original mortgage to date of the assignment ("date-down"). It includes coverages regarding taxes, federal tax liens, and pending bankruptcy proceedings, except as set forth in the endorsement. Lines under each alphabetically listed paragraph provide for entry of intervening liens or matters, if any (if none, type "NONE"). A search of title is required to update the title whenever a 10.1-06 is issued in order to determine if exceptions must be taken to the affirmative assurances set forth therein.

Both versions of the endorsement contain a creditors' rights exception.

## **ALTA Forms 11-06, 11.1-06 and 11.2-06 - Mortgage Modification Endorsements**

The ALTA 11 endorsements are modification endorsements to be issued in those cases where a mortgage is modified after its original date by agreement of the parties. Mortgage modification endorsements have been issued by title insurers for many years in various forms. The ALTA 11-06 and 11.1-06 were adopted in the interest of providing a standardized form for insureds.

The ALTA 11-06 is issued after a modification agreement has been executed and recorded. The endorsement insures against loss or damage due to invalidity or unenforceability of the mortgage as a result of the terms of the modification agreement. It also insures that priority of the mortgage, as modified, continues over any defects, liens and encumbrances on the title, other than those listed as exceptions in either the policy or the endorsement.

The ALTA 11.1-06 is issued when an intervening lien appears in the title search and is made subordinate by agreement to the insured mortgage. Conversely, the 11-06 is used in connection with a mortgage modification where no subordination of an intervening lien is executed.

The ALTA 11.2-06 is issued when a mortgage is being modified or amended and the amount of the mortgage is being increased. Section 1(a) of the endorsement requires the title insurer or agent to insert the name and recording information pertaining to the document which modifies the Insured Mortgage. In Section 1(b) the date the modification is recorded should be inserted.

Section 2 states the new amount of insurance we will be issuing and on which premium tax is being paid. That sum should equal the amount of new consideration being given to the borrower and which is secured by the mortgage modification. Section 3 states the affirmative coverages which the endorsement provides. Note that Section 3. b. allows the insurer to insert any new exceptions for defects, liens or encumbrances which have arisen and are reflected in the public land records subsequent to the date of recording the mortgage and prior to the date of recording the modification. Section 4 contains a creditors' rights exclusion pertaining to the transaction creating the modification. Section 5 is an optional provision intended to be included for those states which impose a mortgage tax on the principal amount secured by a mortgage or deed of trust.

These endorsements are not the same as a "date-down" endorsement as they do not extend all the coverages under the policy to the date of recording of the mortgage modification agreement. When an ALTA 11 is requested, you should review the mortgage modification agreement and conduct a search of the public records between the date of recording of the mortgage and the date of recording of the mortgage modification agreement. Intervening matters which are not released will need to be shown in the endorsement.

## **ALTA Forms 12-06 and 12.1-06 - Aggregation ("Tie-In") Endorsement**

An Aggregation Endorsement is often requested in multi-state transactions when mortgages on different properties secure the same indebtedness. In most instances, the lender requests separate policies insuring the separate parcels. The "tie-in" endorsement states that the various parcels are part

of a single project, references all the policies, and indicates an aggregate amount of title insurance coverage for all the parcels of land included in the project.

These endorsements tie together several policies and provide that the amount of insurance under the Loan Policy to which the endorsement is attached shall be the aggregate of the amount of insurance under each Loan Policy identified in the endorsement. Any payments made by the title insurer under the policy, as endorsed, reduces the aggregate amount of coverage available under all of the policies listed in the endorsement.

### **ALTA 12-06**

The ALTA 12-06 endorsement has been revised and a new ALTA 12.1-06 endorsement created. The 12-06 is intended for use in the situation in which policies insuring mortgages in more than one state are being aggregated for liability purposes in the amount of the combined sum of all mortgages. The ALTA 12-06 is the appropriate endorsement for this purpose *only if the state single risk limit for all states for which policies are issued is equal to or more than the combined principal amount of all mortgages as aggregated.*

Section 1 of the endorsement sets forth the identifying information for each of the individual policies being aggregated, indicating policy number, state in which the real property is located and the individual policy amount. Section 3 sets forth the aggregate amount of insurance for all policies. Sections 4, 5 and 6 of the endorsement set forth the modifications which are necessary in Sections 7, 8 and 10 of the Conditions in order to account for the fact that the individual policy liability is being aggregated with all other policy liabilities reflected in Section 1 of the endorsement.

When the ALTA 12-06 is used it should be attached to each of the individual policies being issued on the transaction.

### **ALTA 12.1-06**

The ALTA 12.1-06 is intended for use in those instances when aggregation coverage is requested, but the total principal amount secured by all mortgages insured under the policies to be aggregated is larger than the single risk state limitation in one or more of the states in which the properties insured under the aggregated policies is(are) located.

The major difference between the 12 and the 12.1 is the addition of Section 3.b. to the 12.1. Section 3.a. of the 12.1 is similar to Section 3 of the ALTA 12. Section 3.b. limits the aggregate amount of insurance coverage the insurer is willing to provide to the single risk limit applicable to the particular state(s) and amount(s) listed in Section 3.b.

Sections 4, 5 and 6 of the 12.1 are similar to the same numbered sections in the 12. Note, however, that Section 6(b)(ii) of the 12.1 is modified to reflect that certain payments made will not reduce the Aggregate Amount of Insurance (a defined term in both 12 series endorsements) set forth in Section 3.b. until the Aggregate Amount of Insurance applicable in Section 3.a., computed according to the

terms of the Conditions, is reduced below the Aggregate Amount of Insurance set forth in Section 3.b.

When a 12.1-06 endorsement is used with respect to a series of loan policies being aggregated, each of the individual policies issued should have a 12.1-06 endorsement attached.

These Endorsements are neither intended nor designed to be issued with the Owner's Policy.

### **ALTA Forms 13-06 and 13.1-06 - Leasehold Coverage Endorsements**

ALTA 13-06 is attached to an ALTA Owner's Policy in order to convert it to a leasehold owner's policy. Likewise, ALTA 13.1-06 is attached to an ALTA Loan Policy in order to convert it to a leasehold loan policy.

These endorsements contain provisions regarding the valuation of the estate or interest insured in computing loss or damage under the policy as well as additional items of loss covered. The endorsements make it clear that valuation can only occur as to that portion of the insured property from which there is an eviction. An additional element of recovery has been added to the earlier versions of these endorsements in order to allow for the recovery of the costs incurred by the Insured to restore the land to the extent of damage resulting from the removal and relocation of "Personal Property", as that term is defined in the endorsement, and required solely as the result of the eviction.

**Note:** No coverage is provided under these endorsements for loss, damage, or costs of remediation which results from environmental damage or contamination.

### **ALTA Forms 14-06, 14.1-06, 14.2-06 and 14.3-06 - Future Advance Endorsements**

Revolving line of credit mortgage loans are identifiable by names such as "revolving line of credit mortgage," "home equity mortgage" and "credit line mortgage." These mortgages permit a borrower to receive future advances and many times re-advances pursuant to an agreed upon line of credit, up to a predetermined and stated maximum amount.

These types of mortgages are intended to secure both present and future advances. As opposed to "open end" mortgages, in which future advances are usually optional, revolving line of credit mortgage advances are usually obligatory up to the stated maximum mortgage amount. While the basic title insurance policy provides protection to the lender as to the mortgage lien as of the date of the policy, no protection is provided with respect to future advances under these mortgages in the absence of special affirmative coverage.

In addition to the mortgage, a number of lenders use a separate agreement to describe when and how advances are made, when a default occurs and its effect on further advances, how payments are to be made and any other terms of the particular revolving line of credit program. Other lenders will place this information in the mortgage itself instead of an agreement.

The ALTA 14 series endorsements provide a lender with protection against any claim of invalidity or unenforceability of an insured mortgage arising as a result of provisions contained in the note and/or loan agreement which the mortgage secures, and which allow for advances to be made after the recording of the mortgage. The endorsements also provide protection against provisions of the note or loan agreement which allow payment of interest on interest, the addition of accrued interest to the principal balance of the loan, or changes in the rate of interest. Such provisions in a note are unauthorized under the laws of some jurisdictions, or, with respect to subsequent advances, may cause the lien of the mortgage to become split in priority as to earlier and subsequent advances. ALTA series 14 endorsements assure lenders that the priority of the mortgage as reflected in the policy will not be impaired by such provisions and that future advances secured by the mortgage will enjoy the same priority as advances made as of the date of closing.

In order to issue the endorsement, the recorded mortgage must state that it secures future advances, even though provisions for future advances are in a separate agreement. Also future advances must be obligatory and the terms in the agreement or mortgage should evidence that. The reason for this is that in many states advances must be obligatory if they are to have the same priority as the recording date of the mortgage.

It is not always easy to determine if the future advances are obligatory, since lenders almost always set out conditions as to whether an advance will or will not be made. Some courts have defined an obligatory mortgage as one in which both parties were bound to perform their agreement at the peril of being subject to damages. Even though a mortgage has conditions that must be met before an advance will be made, if such conditions are within the control of the borrower, the mortgage may still be obligatory. One example of these conditions would be that the total of all advances may never at any one time exceed the stated amount of the mortgage.

Most mortgages will also contain default clauses. For example, if loan payments are not current, advances can be stopped. Despite such clauses, the loan still might be considered obligatory and have priority at least as to those advances made prior to the default. Whether a mortgage does or does not have obligatory advances must be determined on a case by case basis by examining the documents and referring to state law. If you need help with this determination, contact your supervisory office for advice.

**Note:** If you are involved in closing where a revolving line of credit mortgage is being paid off it is difficult to know when all checks and credit card slips have cleared. When asking for a payoff amount for such a loan, always require that it be in writing, signed by a person with authority to sign and that the amount given is an unconditional final payoff. If you have any questions about the payoff figure, require a recordable satisfaction of the mortgage before agreeing to remove the mortgage from the policy being issued.

### **ALTA 14-06 and 14.1-06**

These endorsements are identical, except that the 14.1-06 excepts from coverage liens, encumbrances or other matters, actually known to the insured, and occurring subsequent to the date of policy and prior to the date of a subsequent advance.

### **ALTA 14.2-06 — Letter of Credit**

This endorsement insures future advances made where the insured mortgage secures a letter of credit.

### **ALTA 14.3-06 — Reverse Mortgage**

This endorsement insures future advances made in the context of reverse mortgages. Reverse mortgages are first mortgages securing loans made to older borrowers who, instead of making monthly loan payments, receive monthly payments from the lender. The loan balance increases with each payment received. There are also lump-sum payment reverse mortgages. The loan is often not due until the home is sold or the borrowers no longer live in it. Reverse mortgages enable older borrowers to stay in their homes by using their equity as a source of supplemental income.

Reverse mortgages are not permitted in all states. In those states permitting reverse mortgages, some set minimum age requirements and require counseling for all reverse mortgage loans; others do not. In addition to securing future advances, reverse mortgages may secure fixed or adjustable rates, negative amortization, shared appreciation, compound interest and similar features common to home equity loans. There are widely varying products and standards from state to state. Before insuring a reverse mortgage, contact your supervisory office to ascertain your state-specific requirements.

Our experiences with the HUD and Fannie Mae programs have been positive, as have conventional loans made by such institutional lenders as banks, savings institutions and credit unions that are regulated by federal and state laws. If we have specific concerns then, it is with programs that are not federally insured or are regulated, if at all, by state laws only. Any requests to insure "non-institutional" reverse mortgage lenders must be approved by your supervisory office or the home office. Any request to be the exclusive insurance provider for a non-institutional reverse loan program or by a lender stating that it wishes to switch its program from its current title insurer to Old Republic must also be approved by your supervisory office or the home office.

The ALTA 14.3-06 endorsement provides coverage for the validity and priority of post-policy advances and assures that the priority and validity of the mortgage is not impeded by provisions which provide for interest on interest or changes in the rate of interest. The endorsement also insures that advances and re-advances of principal will have the same priority as initial advances secured by the mortgage. Additional assurances as to compliance with state laws in securing advances, the failure of the insured mortgage to state a term for advances or the maximum amount secured and the borrowers having attained the age of 62 years are contained in the ALTA endorsement.

## **ALTA Forms 15-06, 15.1-06 and 15.2-06 - Non-imputation Endorsements**

New investors in existing partnerships and corporations, or lenders with participation or shared appreciation interests in loans, may request an assurance that liability under the policy will not be denied on the grounds that the insured had knowledge of adverse matters imputed to it by operation of law through existing, former or departing partners, individuals associated with corporations, lenders, or borrowers, respectively. The new investor would also be charged with the same knowledge by imputation by operation of law, with obvious adverse consequences concerning its investment in the event of a title loss. The knowledge of any partner is imputed to all other partners and the partnership entity itself. In the case of corporations, knowledge may be imputed to the entity through officers, directors, shareholders and managers depending on applicable state law. Finally, in the case of a limited liability company (LLC), knowledge may be imputed to the entity through its members.

The ALTA 15 series endorsements cover off-record matters that are imputed by law to the insured, but not matters known to the new investor. What is important to bear in mind when a non-imputation endorsement is requested is that there is usually no conveyance of the property itself; only a change in the participants in the business entity which holds title.

ALTA 15-06 contemplates a transfer of the entire equity interest of the entity holding title while the ALTA 15.1-06 contemplates a partial transfer and limits the coverage to that percentage of the total policy coverage as represents the insured's percentage interest in the entity holding title. What is unique about the ALTA 15.1-06 is that it identifies the new investor (the "Additional Insured") as the insured for purposes of the endorsement. It also requires the consent of the insured under the original policy (the entity holding title) to the endorsement's issuance. Finally, ALTA 15.2-06 also covers a partial transfer of the equity interest, but contains no limitation on coverage as found in ALTA 15.1-06.

Various underwriting factors may come into consideration when issuing the endorsement, including a detailed analysis of the transaction, a satisfactory affidavit and indemnity from the existing or departing partners, etc., and a review of audited financial statements offered by indemnitors, or letters of credit or bonds securing the indemnity. A sample form of non-imputation affidavit is included below. The form of endorsement and affidavit must obviously correspond to the type and form of transaction being insured.

If all partners do not execute the indemnity, coverage should be limited to knowledge imputed only through those who do. In the case of corporations, the number of individual indemnitors is often very limited, especially in the case of large corporations. Coverage should therefore be limited to those individuals executing the affidavit. For example, if a new shareholder is investing in a corporation, and the affidavit is offered by the President/CEO of the corporation, coverage should be confined to that indemnitor's knowledge only, and not an all-inclusive class of individuals who make up the corporate entity.

**Note:** Joint ventures are not typically legal entities capable of holding title to real estate, unless so authorized by state law or unless the joint venture is deemed a partnership under state law. Unless so authorized, the individual joint venturers hold title as tenants in common, and use of a non-imputation endorsement is not appropriate.



**Non-Imputation Affidavit Example**

Sample text of a non-imputation affidavit:

STATE OF \_\_\_\_\_ )

)ss.

COUNTY OF \_\_\_\_\_)

The undersigned, \_\_\_\_\_, being first duly sworn, states as follows:

1. That the undersigned are (general, all of the general, general and limited partners in \_\_\_\_\_, a(n) (limited) partnership (the "Partnership"), which owns the property described in the attached Exhibit A (the "Property");
2. That has formed a(n) general partnership with \_\_\_\_\_ a \_\_\_\_\_(partnership) (corporation), for purpose of taking title to and operating a(n) \_\_\_\_\_ on the Property.
3. The undersigned has/have requested that Old Republic National Title Insurance Company ("Old Republic Title") include a non-imputation endorsement as part of owners coverage to be issued upon the real property for the purpose of providing certain assurances to the insured that Old Republic Title will not deny liability under such policy by virtue of the imputation of knowledge by operation of law from a partner or former partner to the insured (or specific partner of the proposed insured);
4. That there are no existing unrecorded deeds, land contracts, mortgages, leases, options to purchase, agreements or other instruments adversely affecting title to said Property (except as disclosed in writing to Old Republic Title); and that neither the Partnership nor the individual partners have done anything to create any lien, encumbrance, transfer of interest, creation of constructive trust, or other equity in the land whatsoever (except \_\_\_\_\_);
5. That there is/are no outstanding right(s) whatsoever (including unrecorded deeds, demands or equities) in any person to the possession of said premises; nor any outstanding right, title, interest, lien or estate, existing or being asserted in or to said premises except such as are disclosed by the public records of each of the counties in which said lands are located (except the rights of the tenants under those leases disclosed herein);

6. That an independent examination of the business records of the Partnership would reveal that said records are complete and in good order and would not disclose or suggest the existence of any unrecorded debt, demand or equity interest in the land;
7. That there are no judgments or decrees or any orders of any court or officer for the payment of money against said Partnership, unsatisfied or otherwise, in any of the courts or before an officer of the United States, or any suit or proceeding now pending anywhere affecting said Partnership or said Property; that no proceeding in bankruptcy has ever been instituted by or against said Partnership and that said Partnership has never made an assignment for the benefit of creditors, nor an assignment now in effect of the rents of said Property (except \_\_\_\_\_ );
8. That said Partnership has sufficient assets, excluding the value of the aforementioned Property, to satisfy all unrecorded debts, demands or equities created, suffered or permitted by the Partnership and said conveyance of this Property will not render the Partnership insolvent nor is said conveyance in fraud of creditors under the bankruptcy laws of the United States or the laws of the State of \_\_\_\_\_;
9. That this affidavit is given to induce Old Republic Title to affix to its owner's policy, to be issued to the purchaser, its "Non-Imputation Endorsement" (a copy of which is attached hereto as Exhibit B), knowing that without the affidavit Old Republic Title would not issue said endorsement;
10. That the undersigned acknowledge they have read the foregoing and fully understand the legal aspects of any misrepresentation and/or untrue statements made herein and indemnify and hold Old Republic Title harmless against liability occasioned by reason of reliance upon the statements made herein.

\_\_\_\_\_ (multiple signature lines may be necessary)

By: \_\_\_\_\_

Its: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

Notary Public

My Commission Expires:

### **ALTA Form 16-06 - Mezzanine Financing Endorsement**

The ALTA 16-06 endorsement is issued to a mezzanine lender as identified in the policy. A mezzanine lender is an individual or entity who secures its loan with an ownership interest in the title holding entity rather than the real estate itself.

This endorsement makes the Mezzanine Lender an assignee of payments under the Owner's Policy not to exceed the debt owed to the Mezzanine Lender (but does not name the Mezzanine Lender as an additional insured). Under the terms of the endorsement, the title insurer is precluded from interposing defenses against the mezzanine lender it would have against the insured owner for matters known to the insured and not disclosed, matters suffered, assumed and agreed to by the insured owner, and other defenses available to the insurer under Paragraph 3 of the Exclusions From Coverage. The endorsement also operates as a non-imputation endorsement as to matters known to the insured owner, but not known to the mezzanine lender and consequently, a non-imputation affidavit must be obtained from the insured owner. This coverage applies even if the mezzanine lender acquires an interest in the insured owner.

### **ALTA Forms 17-06, 17.1-06, and 17.2-06 - Access and Entry Endorsements**

The ALTA 17 endorsement series expands the coverage given under traditional access endorsements by giving an assurance of both vehicular and pedestrian access. They also give assurances with respect to the right to use existing curb cuts or other entries along that portion of the public right of way abutting the property insured.

ALTA 17-06 insures direct vehicular and pedestrian access to a public right of way abutting the property insured. Prior to issuing this endorsement, you must verify, either through a recent survey or other appropriate means, that the public right of way is physically contiguous with the insured parcel, and the property owner has the legal right to use that means of access.

The ALTA 17.1-06 insures indirect vehicular and pedestrian access to a public right of way pursuant to an easement identified in Schedule A of the policy. To issue this endorsement, you must verify through a recent survey or other appropriate means, that the access easement runs to both the insured parcel and a public right of way, and also that the property owner has a legally enforceable right to use that access easement and that use cannot be terminated by the enforcement or foreclosure of a prior interest affecting the burdened property.

The ALTA 17.2-06 insures the of right of access to specific utilities or services over, under or upon rights-of-way or easements because of: (1) a gap or gore between the boundaries of the Land and the rights-of-way or easements, (2) a gap between the boundaries of the rights-of-way or easements, or (3) a termination by a grantor, or its successor, of the rights-of-way or easements. To issue this endorsement, you must verify through a recent survey or other appropriate means that the utility or service specified in the endorsement does have access to the property. It is not necessary that the utility and/or service lines are connected and available just that access is available if needed.

**Note:** These endorsements have not been approved for use in all states. Before issuing one of the ALTA 17 series endorsements, verify that your state has approved this form.

### **ALTA Forms 18-06 and 18.1-06 - Tax Parcel Endorsements**

These two endorsements insure that the insured land is maintained on the real estate tax rolls as one tax parcel (ALTA 18-06) or as several different parcels which are insured as each having a unique tax identification number (ALTA 18.1-06), and containing no more or less property than the property described in Schedule A. The 18.1-06 endorsement also insures against loss if the insured easement(s), if any, described in Schedule A can be cut off by non-payment of real estate taxes or assessments against the burdened property.

In many jurisdictions, a portion of a larger tax parcel cannot be separately conveyed and therefore the ALTA 18 endorsements are requested as an assurance that a partial conveyance has not occurred. Before issuing one of these endorsements, be sure that the legal description of the land being conveyed contains no more and no less land than what appears on the tax rolls. Additionally, the issuance of an 18.1-06 endorsement requires the knowledge and understanding of your state's laws regarding tax foreclosures and/or forfeitures. If you need help with this determination, contact your supervisory office for advice.

### **ALTA Forms 19-06 and 19.1-06 - Contiguity Endorsements**

ALTA 19-06 insures that two or more parcels insured in Schedule A are contiguous to each other without any gaps or gores along their common boundary. The ALTA 19.1-06 insures that the insured parcel is contiguous to another, uninsured parcel of land along defined lines or boundaries.

These endorsements are most frequently requested when there is an aggregation of metes and bounds parcels that were previously separate. When issuing one of these endorsements, you must either (1) carefully review and plot the legal descriptions of all parcels, along with the perimeter description, in order to ensure there are no overlaps or gores or (2) obtain an accurate survey or other appropriate map depicting all referenced parcels.

### **ALTA Form 20-06 - First Loss Endorsement**

ALTA 20-06 is a standardization of the First Loss Endorsement, several variants of which have been in use for years. This endorsement is used when a Loan Policy is issued for an amount less than the full indebtedness, which is partially secured by the insured mortgage, and partially secured by other property. This endorsement allows an insured to tender a claim under its ALTA Loan Policy whenever a title related loss has occurred.

A lender will want the endorsement in instances in which: (1) several parcels serve as security for the debt secured by the insured mortgage; and/or (2) there exists other collateral, in addition to the land, which serves as security for the loan. The endorsement typically will be given when an owner's policy is in existence which insures the full market value of all parcels. The endorsement gives the lender flexibility in pursuing collection against different forms of collateral and prevents the title insurer from (1) forcing the insured to marshal other assets, or (2) arguing that the insured has not suffered a loss.

Coverage under the endorsement will remain at the full amount of insurance until the total indebtedness (which originally exceeds policy limits) is reduced below the amount of insurance stated in Schedule A. Thereafter, reduction of indebtedness will reduce the amount of insurance available on a dollar-for-dollar basis.

### **ALTA 21 – Creditors’ Rights Endorsement - Not Available**

Creditors’ Rights Coverage is no longer available whether in the form of a specific endorsement or in the use of a 1970 Policy, a U.S.A. Policy, or any similar Policy that provides creditor’s rights coverage for the current transaction. If you are asked to endorse any policy such as through the use of a down date to that policy or to recognize a post policy event and the original policy either did not include a Creditors’ Rights exception or eliminated the exception by endorsement, a Creditors’ Rights exception **MUST** be added to the endorsement. For more information see Company Bulletins 2103-11-0926 and 2103-11-1220

### **ALTA Forms 22.06 and 22.1-06 - Location Endorsement**

These endorsements provide assurance that the property insured in the policy contains a designated improvement located at a specified street address. The Alta 22-06 and the ALTA 22.1-06 are nearly identical; however the 22.1-06 includes the added assurance that the property location and dimensions are accurately shown on an attached map, if one is attached. These endorsements are most often used in metropolitan areas where it is difficult for a lender to verify this information itself, and allows the lender to verify that the property insured matches the lender's appraisal.

When issuing ALTA 22-06, you can confirm through tax records, a recent survey, or other means that the designated improvement is located at the specified street address. When issuing ALTA 22.1-06, if relying upon a map or survey to provide the added assurance, be sure to obtain and attach a copy of that map or survey to the policy or the endorsement.

### **ALTA Form 23-06 - Co-Insurance Endorsement**

This endorsement is intended to standardize the manner in which co-insurance risk is assumed within the industry. The "issuing co-insurer" issues the "co-insurance policy." The co-insurance policy is a traditional ALTA policy identifying the insured, the type of policy issued, the Covered Risks, Exclusions, Conditions, Schedules and endorsements. It only sets forth, however, the specific

amount of coverage for which the issuing co-insurer will be liable. For example, if the total liability for all co-insurers is \$1 million and the issuing co-insurer's liability is 50%, the Amount of Insurance as shown on Schedule A in the issuing co-insurer's policy should be \$500,000.00.

The issuing co-insurer and all other co-insurers sign the co-insurance endorsement to signify the willingness of each to adopt the coverages in the issuing co-insurer's policy as its own. All co-insurance endorsements issued for a specific transaction identify the issuing co-insurer and all other co-insurers (the "co-insuring companies") by name and address, the policy number each has assigned for its policy obligation, the amount of insurance each is assuming and the percentage of the aggregate amount of insurance liability each is assuming. The endorsement makes clear that any notice of claim must be submitted to each of the co-insuring companies and that any endorsements issued after the date of the co-insurance endorsement must be executed by all of the co-insuring companies.

**Note:** The issuance of the ALTA 23-06 endorsement, as well as older issuances of the "Me Too" insurance endorsements must be reported as a policy obligation.

### **ALTA Form 24-06 - Doing Business Endorsement**

The ALTA 24-06 endorsement is issued only in connection with a Loan Policy, and most frequently is requested when the lender does not operate in the state where the property securing the mortgage is located. This endorsement is of great interest to such a lender as the ALTA Loan Policy contains a standard exclusion for loss or damage resulting from the unenforceability of the mortgage lien arising out of the insured lender's inability or failure to comply with the doing business laws of the state where the land is located.

This endorsement insures against a final court decree "prohibiting the enforcement of the lien of the mortgage solely on the grounds that the loan secured thereby violated the 'doing business laws' of the state in which the property is located." The endorsement does not, however, insure that the mortgage lien may be judicially enforced.

When issuing this endorsement, you must be certain that the loan transaction is permitted under state law. Certain states do not require out-of-state lenders to qualify if the particular loan is only an isolated transaction. More often, however, the lender will have to meet some minimum standard. Therefore, before issuing this endorsement, you should determine whether: (1) the lender is specifically licensed for this type of transaction in the state in which the land is located; (2) the lender has been issued an appropriate certificate of authority in the state in which the land is located, or (3) the lender qualifies under an appropriate statutory grant of authority or exemption in the state in which the land is located.

### **ALTA Forms 25-06 and 25.1-06 - Same as Survey Endorsements**

These endorsements provide coverage against loss or damage in the event the land insured in the policy is not the same as that delineated on a designated survey bearing a specific date. The ALTA 25.1-06 is functionally identical to the ALTA 25-06, but indemnifies against loss or damage in the event that the land insured in the policy is not the same as a designated portion of the land delineated on a designated survey bearing a specific date. Both endorsements include blanks that must be filled in, in order to specifically identify the survey being relied upon.

### **ALTA Form 26-06 - Subdivision Endorsement**

The ALTA 26-06 provide coverage against loss or damage in the event that the land insured under the policy has not been lawfully created under state statutes and/or local ordinances relating to the subdivision of real property. Implicit in the endorsement is the idea that the land may be lawfully transferred using the description insured in the policy. Accordingly, before issuing ALTA 26-06, you must be certain that any subdivision of land was appropriately created pursuant to local ordinances and state statutes.

### **ALTA Form 27-06 - Usury Endorsement**

Paragraph 5 of the Exclusions from Coverage of 2006 ALTA Loan Policy, excludes from coverage a loss resulting from the invalidity or unenforceability of the insured mortgage, if the mortgage is found to be usurious. However, there are some transactions in some jurisdictions that may be exempt from usury laws and from time to time you may be asked to give affirmative usury coverage. You should be aware that some states do not permit this coverage.

The ALTA 27-06 provides coverage against loss or damage arising in the event that the lien of the insured mortgage is deemed invalid or unenforceable because the interest rate provided in the loan documents secured by the insured mortgage violates local usury laws. In those states where affirmative usury coverage is permitted, ALTA 27-06 is the appropriate endorsement. Such coverage may only be given if the transaction being insured falls within an exemption to the usury statute. For example, some states exempt from the usury statute loans where the borrower is a corporation, or loans that exceed a certain dollar amount.

You should not give usury coverage in any situation where it is necessary to determine compliance with the provisions of a usury statute. Examples of compliance issues include situations in which it is necessary to compute the interest to determine that the transaction falls below the usury limit, or having to determine whether certain loan charges might be considered as interest. Coverage should only be given when you are satisfied that applicable usury laws do not relate to the loan which the insured mortgage secures.

## **ALTA Forms 28-06, 28.1-06, and 28.2-06 - Easement - Damage or Enforced Removal Endorsement**

The ALTA 28-06 indemnifies against loss or damage arising as a result of damage to any existing building located on the land or any court order directing the removal or alteration of an existing building located on the land as a result of the rights granted in a specifically described easement excepted in Schedule B. This endorsement was drafted to provide an alternative to the issuance of the CLTA 103.1 endorsement by providing coverage more limited in scope than that provided by the CLTA 103.1.

The ALTA 28.1-06 provides limited coverage for certain encroachments. It provides coverage as to loss or damage arising because of an encroachment of an "Improvement", as that word is defined in Section 2 of the endorsement, onto adjoining land or from adjoining land onto the land as well as encroachments of the "Improvements" onto an easement unless an exception in Schedule B specifically identifies the encroachment(s). Additionally, coverage is also provided for the forced removal of any improvements located on the insured property due to an encroachment onto an easement if the owner of the easement compels removal of the improvement in order to exercise the right to use or maintain the easement. Section 4 of the ALTA 28.1-06 allows you to specifically list the encroachment(s) to which an exception in Schedule B has been taken and for which you are not willing to provide any of the coverages included in the endorsement.

The ALTA 28.2-06 provides affirmative indemnification to an Insured as to any loss or damage because of encroachments of Improvements located on the Land described in the policy onto adjoining or from adjoining land onto the Land, unless a Schedule B exception identifies the encroachment.

Further coverage is afforded as to any enforced removal of an Improvement located on the Land which encroaches upon any easement affecting any portion of the Land or the enforced removal of an Improvement located on the land which encroaches onto adjoining Land.

The term "Improvement", as used in this endorsement, refers to those improvements specifically itemized in Section 2 of the endorsement.

## **ALTA Forms 29-06, 29.1-06, 29.2-06 and 29.3-06 - Interest Rate Swap Endorsements**

A "Swap" is a financial transaction that generally involves a simultaneous exchange of assets (the swap) by counterparties for other different assets of comparable value. The assets may be commodities or they may be financial instruments involving interest rates, cash flows, foreign exchange, debts or equities.



The ALTA 29 endorsement series standardizes the insurance coverage for these transactions when the swap obligation is secured by the lien of the mortgage insured in the policy. The endorsements are also intended to make clear that only the specific Swap Obligation referenced in Section 1.b. of each endorsement is insured. The ALTA 29-06 and 29.2-06 endorsements are used when the borrower's obligation under the interest rate swap agreement is characterized as principal. The 29.1-06 and 29.3-06 endorsements are used when the borrower's obligation under the interest rate swap agreement is characterized as interest.

The ALTA 29-06 and the 29.1-06 do not contain a clause requiring the insured to compute the maximum amount of the Swap Obligation, which is included as part of the Indebtedness and capping the maximum amount of loss or damage insured against under the endorsement to that stated computed amount (29-06), or compute the maximum amount of additional interest, and capping the maximum amount of loss or damage insured against under the endorsement to that stated computed amount (29.1-06). Consequently, they should only be used when the maximum Swap Obligation amount is specifically stated in the mortgage being insured. Additionally, neither endorsement directly addresses the payment of additional premium on the Swap Obligation or on the additional interest.

The ALTA 29.2-06 and 29.3-06, were purposefully designed for transactions in which the maximum amount of the Swap Obligation is not specifically identified in the mortgage being insured. These two endorsements include additional provisions which the 29-06 and 29.1-06 do not have. Section 1(c) of the 29.2-06 and Section 1(d) of the 29.3-06 define a new term, "Additional Amount of Insurance." This is the amount of additional coverage we will provide for the swap obligation and we must collect premium on this additional amount of coverage. Since the mortgage being insured does specifically state the maximum Swap Obligation amount, the customer must provide you with the specific amount of additional insurance they want.

Interest rate swap agreements are most frequently documented on forms created by the International Swaps and Derivatives Association (ISDA). ISDA has three forms: Master Agreement, Schedule and Confirmation. The Master Agreement sets forth rules and general terms for one or more interest rate swaps between the parties. The Schedule modifies terms of the Master Agreement. *The Confirmation is the document which creates the binding (insurable) swap obligation.* You should **never** insure an interest rate swap obligation without determining that the confirmation has been executed. The "Date of Endorsement" which is to be inserted in Section 1(a) of each of the endorsements is the date that the confirmation was executed or the date we are asked to issue the endorsement, whichever is later. The "Swap Obligation" as defined in Section 1(b) is the date of the Confirmation is executed by the borrower and the counterparty (party entering into the interest rate swap with the borrower).

Because the swap endorsements insure not only the underlying mortgage indebtedness, but also "breakage," or damages, the potential insured must advise you as to the maximum liability for which

it would like insurance. "Breakage" occurs when the mortgagor defaults on its obligations to the swap provider or in the case of early termination of the swap agreement, and effectively constitutes liquidated damages owed by the mortgagor to the swap provider. The liquidated damages are in addition to the underlying mortgage obligation, and any coverage the insured desires must be written into the endorsement in Section 1(c) of the 29.2-06 and Section 1(d) of the 29.3-06, wherein the maximum liability of the endorsement is stated. Additional premium should be calculated and collected for this amount, as it is policy liability above and beyond the amount stated in Schedule A. You must always fill in an amount in (c) of the 29.2-06 and Section 1(d) of the 29.3-06. **Do not leave these Sections blank.**

As stated earlier, the 29.2-06 is intended for use with mortgages in which the swap obligation is characterized as principal and the 29.3-06 is intended for those mortgages in which the swap obligation is characterized as interest. The 29.3-06 will most likely be appropriate for use in more instances than the 29.2-06 as borrowers and lenders will be motivated not to specify a specific sum attributable to the swap obligation in those instances in which the state where the real property is located imposes a mortgage tax.

The issuance of these endorsements requires consultation with your supervisory office **and** the Corporate Legal Department. For purposes of issuing this endorsement Charlie Jordan is considered a member of the Corporate Legal department whom you may contact.

### **ALTA 30-06 - One to Four Family Shared Appreciation Endorsement**

This endorsement provides coverage to the lender against loss or damage it may sustain in the event any of the provisions of the modification agreement relating to the right to share in the appreciation in value of the home are determined to be invalid or unenforceable, or the mortgage as modified would lose its priority as a result of these provisions. When a mortgage is modified by modification agreement, or if a new mortgage is executed containing provisions for a share of appreciated value, this endorsement can be issued.

A shared appreciation mortgage may be used in connection with loan workouts or other finance transactions. This type of mortgage could secure payment of a portion of the appreciation in value of the land. The new ALTA Residential Shared Appreciation Mortgage Endorsement (30-06) is designed for issuance on mortgages covering one-to-four family residences.

### **ALTA 30.1-06 - Commercial Participation Interest Endorsement**

This endorsement is designed to be issued to a lender in cases where the loan documents provide the lender with "Participation Interest" based on the borrower's equity in the title, the increase in value of the title or the cash flow. It is the commercial property equivalent to the ALTA 30-06 dealing with shared appreciation mortgages on one to four family residences.

The endorsement insures against loss or damage sustained by a lender because of the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage arising as a result of the provisions in the Loan Documents providing for payment or allocation to the lender of Participation Interest.

If asked to issue the 30.1-06 you must be certain that the law of the state in which the real property is located allows the elements constituting Participation Interest to be secured by a mortgage or deed of trust with the same priority as the principal amount of the loan.

### **ALTA 31-06 - Severable Improvement Endorsement**

This endorsement insures against covered loss with respect to certain improvements to the land that, due to the severable nature of the improvements, do not constitute real property. This endorsement applies to commercial properties and insures an insured not only against a loss resulting in the reduction in value of the insured's interest in a "Severable Improvement" as that term is defined in the endorsement, but also the reasonable costs associated in connection with the removal of any Severable Improvement.

The endorsement specifically states that it does not insure ownership of the Severable Improvement, does not insure attachment, priority or perfection of any security interest in the Severable Improvement, does not insure against any defect, lien or encumbrance in the Severable Improvement, and does not insure whether any Severable Improvement constitutes real or personal property. The coverage afforded by this endorsement only pertains to defects otherwise insured by the title policy.

Some states may not allow the filing or use of this endorsement as it allows what may be characterized as personal property to constitute an element of loss, notwithstanding the specific requirement to tie that loss to a covered, real estate title, defect.

### **ALTA 32 Series Endorsements**

The ALTA 32 series endorsements are available for use in situations where the priority of the lien of an insured mortgage or deed of trust does not have absolute priority over potential mechanic's liens and where you will be reviewing draw requests and disbursement records whether or not you are acting as the disbursing agent. The coverage afforded by the ALTA 32 series is significantly more limiting in the lien coverage provided than any other previously issued ALTA products as these endorsements are intended to avoid the potential of having a Loan Policy operate as a payment bond.

If you are not acting as the disbursing agent or are not otherwise reviewing draw requests and disbursement records then none of the ALTA 32 series endorsements should be used.

### **ALTA 32.06 (Loss of Priority Construction Loans)**

The ALTA 32-06 endorsement provides coverage **only** to the extent that the charges for the services and/or materials rendered were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before the Date of Coverage.

This endorsement does not require the Company to disburse the construction funds.

**Note:** When applicable, this is the form of construction loan endorsement required by Section 3.2.C of the Department of Housing and Urban Development Federal Housing Administration Multifamily Program Closing Guide dated September 1, 2011.

### **ALTA 32.1-06 (Construction Loan – Loss of Priority – Direct Payment)**

The ALTA 32.1-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers have been made by the Company or by the Insured with the Company's written approval and **only** for services, labor, materials or equipment for which the Mechanic's Lien is claimed.

This endorsement does require that construction disbursements be made by the Company either making direct payments to labor and material suppliers or by specifically authorizing, in writing, that such a payment be made.

### **ALTA 32.2-06 (Construction Loan – Loss of Priority – Insured's Direct Payment)**

The ALTA 32.2-06 endorsement provides coverage **only** to the extent that direct payments to the labor and material suppliers has been made by the Insured or on the Insured's behalf on or before the Date of Coverage and **only** for services, labor, materials or equipment for which the Mechanic's Lien is claimed.

It does not require the Company to disburse the construction funds.

### **ALTA 33-06 – Disbursement Endorsement**

This endorsement, which acts as a date down endorsement for construction disbursements and draws, is to be used solely in connection with the ALTA 32-06, 32.1-06, or 32.2-06. The endorsement provides for a change to the Date of Coverage as defined in the ALTA 32 series, but does not change the Date of Policy or any other endorsements issued in connection with the policy. It also requires the insertion of any additional exceptions resulting from the title search done in connection with the issuance of the endorsement.

**Note:** This endorsement may only be issued in conjunction with the ALTA 32 series endorsements.

### **ALTA 34-06 – Identified Risk Coverage**

The creation of the ALTA 34-06 endorsement constitutes an attempt by ALTA to standardize the various “affirmative coverage” endorsements in the marketplace which indemnify against loss or damage occasioned by certain title matters of record which are not likely to cause a loss of title or be enforced against the named insured. Often the “affirmative coverage” language will appear in Schedule B following an exception. The endorsement is intended for those situations in which you are not willing to delete a certain exception from Schedule B of a title policy, but believe the risk of loss to a prospective insured is so slight that you are willing to provide a limited form of indemnification with respect to the specific defect, lien, encumbrance or other matter excepted to. It will be primarily issued in lieu of an affirmative statement following the pertinent Schedule B exception.

The ALTA 34-06 may be issued using the same underwriting criteria currently used in issuing similar indemnifications with respect to title matters we intend to show in Exhibit B of title policies and for which we are willing to provide limited indemnifications against loss. It provides coverage in the event that a final court order or decree enforces an Identified Risk in favor of an adverse party. It also insures, subject to certain conditions stated in the endorsement, against loss or damage as a result of the release of a prospective purchaser or lessee of the Title or lender on the Title from the obligation to purchase, lease or lend as a result of the Identified Risk.

Rather than providing the “affirmative coverage” language after the Schedule B exception, you should show the matter as an exception on Schedule B of the policy and attach the ALTA 34-06 endorsement providing affirmative coverage over the exception identified in the endorsement.

### **ALTA 35 Series Endorsements (Minerals)**

These endorsements are designed to provide limited coverage for damage to improvements located on the surface of the land because of the use of the surface to extract minerals and other subsurface substances that are excepted from the description of the Land or excepted in Schedule B. This coverage was previously available through some of the older ALTA 9 series endorsements.

### **ALTA 35-06 - Minerals and other Subsurface Substances (Buildings)**

The 35-06 defines "Improvements" to be buildings located on the land at Date of Policy. The endorsement indemnifies an Insured against loss or damage caused by forced removal or alteration of Improvements arising from the future exercise of any legal right existing at Date of Policy to extract or develop minerals or any other subsurface substances that are excepted from the description of the Land or excepted in Schedule B.

These endorsements provide limited coverage for damage or interference with "Improvements" (as defined in each of the endorsements) because of the development or extraction of minerals or other subsurface substances excepted either from the description of the Land or excepted in Schedule B. Section 4(c) of each of these endorsements allows the insurer to specifically exclude from the scope of the endorsement's coverage any specific item excepted in the policy if it feels providing the endorsement's coverage with respect to such item poses too great a risk.

**ALL** of the 35 series endorsements specifically exclude indemnification for loss or damage which results from contamination, fire, subsidence or negligence by the owner of the minerals or other subsurface substances.

### **ALTA 35.1-6 - Minerals and other Subsurface Substances-(Improvements)**

It provides the same indemnification coverage as to the Improvements as the 35-06, however, in this endorsement "Improvements" are defined to include improvements affixed to the land at Date of Policy which by law constitute real property, but specifically excepting landscaping, lawn, shrubbery or trees.

### **ALTA 35.2-06 - Minerals and other Subsurface Substances – (Described Improvements)**

The 35.2-06 defines "Improvements" by reference to a specific itemized list of improvements set forth in the endorsement. The same coverage with respect to the removal or alteration of such improvements is provided as is provided in the 35-06 and 35.1-06.

### **ALTA 35.3-06 Minerals and Other Subsurface Substances – (and Under Development)**

The ALTA 35.3-06 endorsement defines "Improvements" in the same manner as the 35.1-06 but also has an additional definition entitled "Future Improvements". This is defined as a building, structure, and any paved road, walkway, parking area, driveway, or curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law constitute real property, but excluding any crops, landscaping, lawn, shrubbery or trees. The term "Plans" is defined as it is in the ALTA 9 endorsements discussed above.

The 35.3-06 indemnifies an Insured as to loss or damage arising as a result of the enforced removal or alteration of any Improvements or Future Improvements which results from the exercise of a right existing on Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances. This endorsement is subject to the same exclusions as the other 35 series endorsements.

## **ALTA 36 Series Endorsements**

The ALTA 36 series has been developed for use on energy projects. Seven endorsements comprise the 36 series. The endorsements generally combine elements of the ALTA 9 and ALTA 13 series endorsements as well as the ALTA 31 (Severable Improvement) endorsement. Alternative energy projects, which have become much more numerous in recent years, almost always entail aggregations of several parcels of land. Alternative energy transactions, perhaps more than any other, have seen customers and title insurers craft specific endorsements unique to the sorts of issues presented by the projects.

### **ALTA 36-06 (Energy Project-Leasehold/Easement-Owner's)**

There are 12 defined terms in the 36-06. These definitions are necessary because, for the most part, they are terms of art which are used throughout the endorsements. The rights which are granted for developing and maintaining energy projects and facilities can be comprised of fee simple interests, leasehold interests or easement interests. For that reason, six of the defined terms are "Easement, Easement Interest, and Easement Term" and "Lease, Leasehold Estate and Leasehold Term." The endorsement introduces the term "Electricity Facility". It is defined comprehensively to include the terms of art which are used in describing the unique, individual components of electricity facilities. The term "Plans" is the same as in the other endorsements described in this Bulletin. The definition of "Severable Improvement", although tailored for an Electrical Facility" is similar to the same definition appearing in the ALTA 31-06.

Section 3 is the valuation section of the endorsement. If the Insured is evicted from any part of the Land it is entitled to be compensated for the value of the interest insured for its remaining term and the value of any Electricity Facility located on the property at that time. The loss determination also includes the loss in value to the integrated project caused by the eviction. The endorsement allows the Insured to have any interest insured under the policy valued either as a whole or separately in computing loss. The Insured's recovery is reduced by any rent or use payments no longer required to be paid because of an eviction. The endorsement does not diminish the Insured's rights under any other endorsements, but duplication of recovery under any other endorsements or the policy itself is specifically prohibited. Recovery for Severable Improvements is allowable to the same extent and is determined in the same manner and using the same formula as in the 31-06.

Section 5 details additional items of loss covered by the endorsement. This section covers the same items of loss as and is specifically tailored after Section 3 of the ALTA 13 series endorsements.

Excluded from coverage is loss, cost or damage relating to remediation resulting from environmental damage or contamination.

**ALTA 36.1-06 (Energy Project-Leasehold/ Easement —Loan)**

This is the loan counterpart to the 36-06. It contains an additional defined term, "Tenant", which is defined as the tenant under a lease, the grantee under an Easement, or the Insured, if it acquires the Title in accordance with the policy. The balance of the endorsement reads as the 36-06 does.

**ALTA 36.2-06 (Energy Project-Leasehold-Owner's)**

This endorsement is intended for energy projects in which there are no easements among the interests insured under the policy. It is identical to the 36-06 in all particulars except that it does not contain any insurance pertaining to easements.

**ALTA 36.3-06 (Energy Project-Leasehold-Loan)**

This endorsement is the loan policy counterpart to the 36.2-06. It is identical to the 36.2-06, except for the inclusion of the definition of "Tenant", which is identical to the definition in the 36.1-06.

**ALTA 36.4-06 (Energy Project-Covenants, Conditions and Restrictions-Land Under Development-Owner's)**

This endorsement is tailored after the ALTA 9.8-06, however, it is specifically tailored for energy projects. The coverages and exclusions are the same as in the 9.8-06, except that they apply only to Electricity Facilities and Severable Improvements as those terms are defined in the endorsement.

**ALTA 36.5-06 (Energy Project-Covenant, Conditions and Restrictions-Land Under Development-Loan)**

This is the loan counterpart to the 36.4-06, discussed above, and is tailored after the ALTA 9.7-06.

**ALTA 36.6-06 (Energy Project-Encroachments)**

This endorsement provides coverage as to encroachments of improvements located on adjoining land onto the land, encroachments of Electricity Facilities or Severable Improvements onto adjoining land, enforced removal of or damage to any Electricity Facility or Severable Improvement as a result of its encroachment onto an easement in the event the owners of the easement force the removal of the Electricity Facility or Severable Improvement pursuant to a right of use or maintenance contained in the easement.

Section 3.e. of the endorsement specifically allows the insurer to except from the scope of the endorsement's coverage any identified encroachment appearing in Schedule B of the underlying



policy. Section 4 of the endorsement excludes from the scope of coverage loss or damage arising from contamination, explosion, fire, vibration, fracturing, earthquake or subsidence.

#### **ALTA 36.7-06 Endorsement (Energy Project-Fee Estate-Owner's Policy)**

This endorsement provides coverages parallel to the other 36 series endorsements (described in the Company's Bulletin 1605-120330). The 36.7 endorsement is to be used when the ownership interests insured in the ALTA Owner's Policy to which the endorsement is attached insure a fee ownership. The other endorsements in the 36 series intended for Owner's Policies insure easement and leasehold interests.

There are fewer defined terms in Section 2 of the 36.7. Eliminated are the definitions pertaining to leases and easements. The terms "Evict" or "Eviction" appearing in the 36-06 are replaced by "Eject" and "Ejection", terms more appropriate for an endorsement insuring fee ownership. The basic provisions in Section 3 through 6 of the endorsement are the same as in the 36-06, except that the ability to recover leasehold or easement payments which the Insured is obligated to pay which is covered in the ALTA 36-06 is not included in the 36.7 since the 36.7 covers only fee ownership interests.

#### **ALTA 36.8-06 Endorsement (Energy Project-Fee Estate-Loan Policy)**

This endorsement is the loan counterpart to the 36.7 endorsement for owner's policies described, above. The same definitional changes are made as are made in the 36.7. One additional definitional change is the substitution of the term "Vestee" for "Tenant" in the 36.1-06. Insurance coverages track with those in the 36.1-06, except that, like the 36.7, the 36.8 does not include indemnification for leasehold or easement payments which the Insured makes after a Covered Loss is established.

#### **ALTA 37-06 (Assignment of Rents and Leases)**

This endorsement was developed to standardize a form of endorsement frequently requested on commercial transactions. The endorsement provides two indemnification coverages which protect a lender against: (1) any defect in the execution of the Assignment; and (2) any Assignment of Leases and Rents appearing in the Public Records which is not excepted in Schedule B.

#### **ALTA 38-06 (Mortgage Tax)**

This new endorsement is intended for use only in states which impose a tax on mortgage transfers or similar instruments. **This endorsement should only be issued in those instances in which we have confirmed that the appropriate amount of mortgage or other intangible tax has been paid by or on behalf of the insured lender.** It indemnifies a lender which pays any deficiency in a mortgage tax, including interest and penalties, against: (1) the invalidity or unenforceability of the lien of the Insured Mortgage as security for the Indebtedness arising from the failure to pay any portion of the Mortgage Tax at the time of recording; and (2) any lack of priority of the lien of the Insured Mortgage arising from any failure to pay any portion of the Mortgage Tax at the time of recording. "Mortgage

Tax" is defined in the endorsement to mean a recordation, registration or related tax or charge required to be paid at the time of recording the mortgage.

As stated above, the endorsement should only be issued when we are certain that the appropriate amount of mortgage tax has been paid. If the endorsement is requested when the tax is paid after the mortgage is recorded *we must confirm that no matter has been recorded in the Public Records which might prime the lien of the Insured Mortgage*. Or, if failure to timely pay the mortgage tax does not affect the priority of the mortgage in a particular state (provided the appropriate tax is ultimately paid), the endorsement may be issued.

#### **ALTA 39-06 (Policy Authentication)**

This endorsement standardizes the various versions crafted by each underwriter to acknowledge liability under a title policy issued in an electronic format.

The endorsement states that when a policy is issued by the Company with a policy number and Date of Policy that the Company will not deny liability solely because the policy or any endorsement was issued electronically or lacks signatures in accordance with the Conditions.

#### **ALTA 40-06 (Tax Credit – Owner’s Policy)**

This endorsement allows a loss to be paid to a "Tax Credit Investor", as is defined in Section 2.a. of the endorsement, if a "Tax Credit" relating to the Land in effect at Date of Policy under the Internal Revenue Code or other applicable law is lost solely as a result of a title defect for which there is coverage in the policy.

The title insurer has no liability under the endorsement until the Tax Credit Investor establishes the reduction in the amount of the Tax Credit. Specifically excluded from coverage and does not insure: a) the eligibility of the Tax Credit Investor or the Land for a Tax Credit; b) that the Tax Credit Investor or the Land is entitled to a Tax Credit; or c) the existence, ownership or amount of a Tax Credit.

The 40-06 operates as a partial assignment by the Insured to the Tax Credit Investor of a right to a payment for loss or damage otherwise payable to the Insured. The Insured also acknowledges by executing the endorsement that any payment made by the Company to a Tax Credit investor reduces the Amount of Insurance under the policy in accordance with Section 10 of the Conditions. If a 40-06 is issued, the Insured must execute the endorsement in addition to an authorized signatory of the Company.

#### **ALTA 40.1-06 (Tax Credit – Defined Amount - Owner’s Policy)**

This endorsement is the same in concept as the 40-06, discussed above. The 40.1-06, however, contains an additional defined term in Section 2.c., for "Additional Amount of Insurance", a term used to define an amount that is in addition to the Amount of Insurance in Schedule A of the policy and which applies only to loss or damage payable to the Tax Credit Investor under

the endorsement. The insurance coverage and exclusions and conditions in the 40.1-06 are the same as in the 40-06.

**NOTE:** This endorsement creates policy liability above and beyond the amount stated in Schedule A. When the 40.1-06 endorsement is issued, additional premium, based on the Additional Amount of Insurance as listed in Section 2. c. of the endorsement, must be collected.

### **ALTA 41 Series (Water Endorsements)**

The ALTA 41 series endorsements are similar in design and intent to the ALTA 35 series endorsements pertaining to "Minerals and other Subsurface Substances." Like the ALTA 35 series, the ALTA 41 series indemnifies an Insured against damage by reason of the enforced removal or alteration of any Improvement (as defined in the endorsement). Each of the endorsements provides the same basic coverage and excludes from coverage loss or damage arising from contamination, explosion, fire, vibration, fracturing, earthquake or subsidence or negligence by a person or Entity exercising a right to extract or develop water.

**Note:** The definition of Improvement differs in each endorsement.

#### **41-06 (Water-Buildings)**

In this endorsement "Improvement" is defined as a building on the Land at Date of Policy.

#### **41.1-06 (Water-Improvements)**

In this endorsement "Improvement" is defined as "a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding crops, landscapes, lawn, shrubbery or trees."

#### **41.2-06 (Water-Described Improvements)**

In this endorsement "Improvement" refers to each item referenced on a list appearing in the endorsement or attached to the endorsement.

#### **41.3-06 (Water-Land Under Development)**

This endorsement provides the same coverage provided in the 41.1-06 described above. In addition, it provides coverage as to "Future Improvements" as depicted on "Plans" of a designated architect or engineer bearing a certain date, identifying a specific project name or number and containing a designated number of pages.

### **ALTA 42-06 Endorsement (Commercial Lender Group)**

Commercial loans of a certain size generally originate with more than one lender, each of which is defined as a "Participant" in Section 2. b. of the endorsement. Collectively, these Participants comprise a "Lender Group", as defined in Section 2. a. of the endorsement. The endorsement, similar to those which all underwriters have issued in one form or another for years, indemnifies the Insured against loss or damage sustained because of the invalidity or

unenforceability or loss of priority of the lien of the Insured Mortgage caused by transfers of any portion of the Indebtedness by the Participants after Date of Policy.

The Company retains any defense as to any Participant that it would have as to the Insured unless that Participant acquired its portion of the Indebtedness as a purchaser for value without knowledge of the defect, lien, encumbrance or other matter insured against by the policy.

#### **ALTA 43-06 Endorsement (Anti-Taint)**

ALTA adopted this endorsement in an attempt to standardize the form of coverage provided. The endorsement is used when the Insured Mortgage secures obligations under a revolving credit loan and a term loan. It indemnifies the Insured against loss or damage arising from the loss of priority of the Insured Mortgage as security for the Term Loan resulting from subsequent reductions and readvances of the Revolving Credit Loan.

#### **ALTA 44-06 (Insured Mortgage Recording-Loan)**

This endorsement is intended to be used when the Loan Policy as initially issued does not contain the recording information pertaining to the Insured Mortgage. It indemnifies the lender against loss, cost or damage caused by the failure of the Insured Mortgage to have been recorded in the Public Records as set forth in the Endorsement.

#### **ALTA 45-06 (Pari Passu Mortgage-Loan Policy)**

The ALTA 45-06 endorsement has been adopted in an attempt to standardize an endorsement that most title insurers have been issuing for decades. The endorsement is intended for those transactions in which the same title insurer is insuring two or more mortgages which have the same priority.

Section 2 is the definitional section of the endorsement. It defines "Intercreditor Agreement" as an agreement between each of the *Pari Passu* Lenders described in Schedule B of the policy. The Intercreditor Agreement is generally the agreement in which the Insured and the *Pari Passu* lenders agree that the mortgage or deed of trust of each will have the same priority. "Pari Passu Lender" is defined as each lender secured by a *Pari Passu Mortgage* that has a policy from the insurer insuring its mortgage and the *Pari Passu Mortgages*. "Pari Passu Mortgage" is defined as the Insured Mortgage and each mortgage described in enumerated exceptions in Schedule B of the policy.

Section 3 contains the indemnifications provided in the endorsement. The endorsement indemnifies against loss sustained in the event: 1) the Insured Mortgage is deemed invalid solely as a result of provisions in a *Pari Passu Mortgage* or Intercreditor Agreement establishing lien priority; and 2) the lack of equal priority of the Insured Mortgage to the other *Pari Passu Mortgages*.

Section 4 excludes coverage arising from: 1) failure of the Insured or any other *Pari Passu* Lender to comply with the terms of the *Pari Passu Mortgage* or an Intercreditor Agreement; 2) failure of the Insured and each other *Pari Passu* Lender to simultaneously foreclose the *Pari*

Passu Mortgages; and 3) any provision in the Intercreditor Agreement that creates a preference among the Pari Passu Lenders for sharing of the Indebtedness.

Section 5 gives the Insurer the right to bring an interpleader action if the Insured and other Pari Passu Lenders have conflicting claims to the amount of any loss payable under the policy.

In order to issue this endorsement we need to review the Insured Mortgage, all other Pari Passu Mortgages and any Intercreditor Agreement to be certain that all Pari Passu Mortgages have the same priority.

**NOTE: ALL PARI PASSU LENDERS MUST EXECUTE THE INTERCREDITOR AGREEMENT IF THAT IS THE MECHANISM FOR CREATING EQUAL PRIORITY.**

### **Additional non-ALTA Forms**

#### **FNMA Balloon Mortgage Endorsement**

This endorsement insures that FNMA balloon mortgage loans are valid and enforceable and can be refinanced with the same priority. The underwriting rationale is quite simple. Paragraph 2 of the balloon mortgage form provides that the borrower will not create or allow any liens or encumbrances other than the FNMA mortgage and paragraph 5 provides that FNMA will not refinance if there are any other intervening matters. Therefore, we can be absolutely certain that any refinance will enjoy the same priority if there is full compliance with both paragraphs 2 and 5 of the endorsement.

#### **ORT Endorsement Form 103 — Deletion, Correction or Amendment to Policy**

Endorsement Form 103 is to be used when you make an addition, deletion, correction or amendment to any policy previously issued. This assumes that you are not re-writing the policy. A common use of this form is made where, after a mortgage policy has been issued, an Assignment of Mortgage is filed and you are requested to extend the policy date to include the date of filing of the assignment.

Whenever an endorsement is used which will extend the effective date of the policy, it is necessary to continue the title down through such date. Where such search discloses any change in the title, this change must be shown on the endorsement (a common change is for current real estate taxes).

**ALTA EXPANDED COVERAGE RESIDENTIAL OWNER'S POLICY**  
**ORT Form 4445 (formerly 3990)**

Overview

In 2008, ALTA adopted the 2008 Homeowner's Policy of Title Insurance ("Expanded Homeowner's Policy"), which updated the earlier 10/17/98 Homeowner's Policy of Title Insurance. The Company has filed this policy in select states as ORT Form 4445 (formerly Form 3990 for the 10/17/98 version), together with its own Schedule A, ORT Form 4445A and Schedule B, ORT Form 4445B.

This Expanded Homeowner's Policy is designed for use in insuring existing one-to-four family residences and residential condominiums, and most commonly, where the land is legally described as being a part of a recorded plat or other government authorized map. The Expanded Homeowner's Policy may be issued on lands described by metes and bounds, but it is critical that you first determine whether there are any survey, CCR and zoning risks or other land violations, and if so, either make appropriate exception for those matters, or delete the appropriate Covered Risks by way of policy endorsement (see paragraphs 4 and 11 below). This policy is not to be used for vacant land or land under construction. If it is issued on recently completed construction, you must independently verify that payment has been made for all lienable costs and that all occupancy permits have been issued.

Only certain parties will qualify as an Insured under the Expanded Homeowner's Policy. Note that each insured named in Schedule A must be a "Natural Person," which, under the Definitions (paragraph 1 of the Conditions), means a human being, including a trustee of a trust, even if the trustee is not a human being. If a proposed Insured does not meet the definition of "Natural Person," then a different policy must be issued.

The Expanded Homeowner's Policy provides coverage for homeowners beyond that of a standard policy, and introduces certain Deductible Amounts and Maximum Dollar Limits on particular liabilities (see Schedule A, ORT Form 4445A). A significant change from the standard owners' policies is the affirmative coverage for certain matters occurring after the Policy Date and for certain land use, encroachment and zoning coverage. Note that this policy incorporates plain language intended to be easily read and understood by consumers.

The 2008 Expanded Homeowner's Policy contains 32 "Covered Risks" (versus 29 in the 10/17/98 version), compared to 4 Covered Title Risks in the 1992 ALTA Owner's Policy (ORT Form 402), and 10 Covered Risks in the 2006 ALTA Owner's Policy (ORT Form 4309). Because of the expanded coverage, in some cases further underwriting will be required in addition to customary underwriting considerations made when issuing a standard Owner's Policy. In those jurisdictions where a Seller's Affidavit is used, necessary additional statements should be obtained by using a Supplemental Affidavit (ORT Form 4477; see manual section entitled "Supplemental Affidavit Example") or by drafting a new affidavit. In other areas, the law or practice (or both)

require the use of Disclosure Statements, which cover many if not all of the matters that would be set out in the Supplemental Affidavit. If, however, any of the statements set out in the Supplemental Affidavit are not covered by a Disclosure Statement, you should obtain the additional necessary statements by requiring an appropriate affidavit.

If you have knowledge of a problem, or a problem is disclosed to you, you may still be able to offer this policy, but with some exception(s) to coverage in the event the problem still exists at the time of closing. In all cases, the Commitment to Insure should clearly state that the premises may have to be inspected and/or further investigated, and that the Company reserves the right to require the receipt of supportive affidavits or disclosure statements, satisfactory to the Company.

You should familiarize yourself with the provisions of this expanded coverage, and, as with other owners' policies, undertake to minimize exposure to liability for these matters. The following is intended as an overview of the coverage and related underwriting guidelines. If you have specific questions, you should contact your supervisory office.

The Expanded Homeowner's Policy includes, among its many features, the following "Covered Risks":

#### **1. Covered Risks - Matters Occurring After the Date of Policy**

Historically, defects, liens, encumbrances, adverse claims or other matters attaching or created subsequent to the date of policy would be excluded from coverage. Paragraph 4.d. of the Exclusions From Coverage does contain an exclusion for such future matters, except for Covered Risks 7, 8(e), 25, 26, 27 and 28.

- a. **Covered Risk 7:** Any of Covered Risks 1 through 6 occurring after the Policy Date are covered:
  - Covered Risk 1: Another owns an interest in the title.
  - Covered Risk 2: Rights arising out of leases, contracts or options.
    - Covered Risk 3: Claim of rights arising out of forgery or impersonation.
  - Covered Risk 4: Easements.
  - Covered Risk 5: Another has the right to limit the owner's use.
  - Covered Risk 6: Title is defective.
- b. **Covered Risk 8(e):** A lien occurring before or after the Policy Date, for labor or material furnished before the Policy Date.
- c. **Covered Risk 25:** Damage to existing (or later replaced or modified) improvements including lawns, shrubbery or trees, due to the future exercise of land surface-use rights, for the extraction of minerals, water or other substances, even if they are excepted or reserved from the land description or excepted at Schedule **B**.

**Note:** If there is known exposure as to Covered Risk No. 25, you must **delete** the Covered Risk by issuing an Endorsement to the policy. For example, as follows:

*The following Covered Risk is hereby deleted from the Policy:*

*Covered Risk No. 25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.*

- d. **Covered Risk 26:** Someone tries to enforce a discriminatory (race, color, religion, sex, handicap, familial status or national origin) covenant.
- e. **Covered Risk 27:** Assessment of supplemental real estate taxes, not previously assessed, for any period before the Policy Date, caused by construction or a change in ownership or use before the Policy Date.

If under the law of your jurisdiction, supplemental real estate taxes will be assessed after the Policy Date, due to improvements made or a change in ownership occurring before the Policy Date, you must confirm from the taxing authority the amount of any supplemental tax that will be assessed and collect that amount as a part of the settlement.

In addition, many states have real property tax "rollback" laws imposed on land when it is no longer used for agriculture purposes. Under such laws, taxing authorities may impose ("recapture") an additional tax for a certain limited number of years preceding the year in which the use changed. Therefore, you must determine the use of the real property during whatever period applies in your state, whether the use has changed within that period or whether the use will change on or before the Date of Policy. If a rollback tax applies, that should be confirmed and collected as a part of the settlement.

- f. **Covered Risk 28:** After the Policy Date, a neighbor builds an encroaching structure -- other than a boundary wall or fence.

## **2. Expanded Access Coverage - Covered Risk 11**

The Expanded Homeowner's Policy assures actual pedestrian and actual vehicular access to and from the land, based on a legal right. The 1992 and 2006 owners' policies assure only legal access. Thus, with the Expanded Homeowner's Policy, you must confirm that there is a legal right to vehicular and pedestrian access, and that they both actually exist. The record should reveal the legal right of access. The Supplemental Affidavit/Disclosure Statement should address



these issues (particularly the issue of physical access) and you may have to inspect the property to ensure that actual access is possible.

3. **Non-Record Matters - Use Rights and Encroachments Coverage; Covered Risks 4, 5, 21, 22, 23, 24, 31**

This coverage relates to losses resulting because of unrecorded rights of use, easements, encroachments and other matters that an examination of the public record alone cannot resolve. You may need satisfactory evidence independent of the record, such as an inspection report, an available survey, appropriate affidavits and/or disclosure statements, to determine, for example, whether a neighbor has an easement over, or an encroachment onto, the insured property.

- a. **Covered Risk 4:** Someone else has an easement on the land.
- b. **Covered Risk 5:** Someone has a right to limit the insured's use of the land.
- c. **Covered Risk 21:** The insured is forced to remove an existing structure because it encroaches onto the neighbor's land. If the structure is a boundary wall or fence, then the amount of insurance is subject to the deductible and dollar limits set out in Schedule A, ORT Form 4445A.
- d. **Covered Risk 22:** Someone has a right to, and does, refuse to perform under a contract to purchase, lease, or make a mortgage loan on the insured land, because the neighbor's existing structures encroach onto it.
- e. **Covered Risk 23:** The insured is forced to remove an existing structure because it encroaches onto an easement or over a building set-back line, even if such matters are excepted at Schedule B.
- f. **Covered Risk 24:** Damage to the insured's structures, caused by the exercise of a right to maintain or use any easement affecting the land, even if the easement is excepted at Schedule B.
- g. **Covered Risk 31:** The residence with an address shown in Schedule A is not located on the land at the Policy Date.

**Note:** If there is known exposure as to Covered Risk Nos. 23 or 24, you must **delete** the Covered Risk(s) by issuing an Endorsement to the policy. An example is as follows:

*The following Covered Risk is hereby deleted from the Policy:*

*Covered Risk No. 23. 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 set-back line is excepted in Schedule B.*

#### 4. Other Non-Record Matters - Land Use & Zoning; Covered Risks 16, 18, 19, 20

There is expanded coverage for land use matters such as subdivision, zoning, permit and setback laws and regulations. As noted earlier, this policy is designed for platted land. For land described by metes and bounds, or for subdivisions known for violations, the policy may not be issued unless you have verified that no land use violations exist in the records of the appropriate county or municipal offices.

- a. **Covered Risk 16:** Loss occurs because an existing violation of a subdivision law or regulation: (a) prevents the insured from obtaining a building permit, or (b) forces the insured to correct or remove the violation, or (c) results in another exercising a legal right to refuse to perform under a contract to purchase, lease, or make a mortgage loan on the insured land.
- b. **Covered Risk 18:** Loss occurs because a portion of the insured structure (other than a boundary wall or fence) was built without obtaining a building permit and the insured is forced to remove or remedy the existing structure. The amount of insurance is subject to the deductible and dollar limits set out in Schedule A, ORT Form 4445A.

**Note:** In order to offer this coverage, you must require an affirmative statement in the Supplemental Affidavit/Disclosure Statement that no improvements have been made to the property during the seller's term of ownership without obtaining required building permits, and that seller does not know of any improvements made without a permit.

- c. **Covered Risk 19:** The insured structures violate existing zoning laws or regulations, and loss is suffered because the insured is forced to remove or remedy the violation. If the insured is required to remedy the violation, the amount of insurance is subject to the deductible and dollar limits set out in Schedule A, ORT Form 4445A. See also Covered Risk 20, regarding set-back violations.
- d. **Covered Risk 20:** Loss occurs because the use of the property as a single-family residence violates an existing zoning law or regulation.

#### 5. Covered Risks 12 and 13 - Covenants, Conditions and Restrictions

- a. **Covered Risk 12:** Loss occurs because a violation of a covenant, condition or restriction, forces the insured to correct or remove the violation, even if the CCR is excepted at Schedule B.
- b. **Covered Risk 13:** Title to the insured property is lost or taken because of a violation (before the insured acquired title) of a covenant, condition or restriction, even if the CCR is excepted at Schedule B.

You must analyze the written covenants, conditions and restrictions in the context of the existing uses of the land, and you should satisfy yourself that there are in fact no

violations, via independent information from an inspection report, available survey, or appropriate affidavits/disclosures identifying the use to which the property is devoted.

**Note:** If there is known exposure as to Covered Risk Nos. 12 or 13, you must **delete** the Covered Risk(s) by issuing an Endorsement to the policy. For example, as follows:

*The following Covered Risk is hereby deleted from the Policy:*

*Covered Risk No. 13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.*

**6. Covered Risks 14, 15 and 17 — Violations or Enforcement Actions of Record**

- a. Covered Risk 14:** Extends coverage over violations of, or enforcement actions based on, governmental regulations including: building, zoning, land use, improvements on the land, land division or environmental protection. This coverage is limited only to those violations or enforcements for which there was a notice recorded in the public records prior to the policy date, and then the liability is only to the extent of the violation or enforcement stated in that notice. There is no comparable coverage in the 10/17/98 version.
- b. Covered Risk 15:** Extends coverage over an enforcement action based on the exercise of governmental police power, but only if a notice is recorded among the public records prior to the policy date. Again, the liability is limited to the extent of the enforcement action stated in that notice. There is no comparable coverage in the 10/17/98 version.
- c. Covered Risk 17:** Extends coverage over condemnation actions but only if (1) there is a notice recorded among the public records and the notice describes any part of the insured land, or (2) the taking happened before the policy date and the Insured purchased the insured land without knowledge of the taking. There is no comparable coverage in the 10/17/98 version.

**7. Covered Risk 32 - Attaching a Map**

Any map attached to a policy must be compared to the legal description at Schedule A, to confirm that the map shows the correct location and legal description of the Land, according to the Public Records.

**8. Covered Risk 8d - Association Charges**

If the search reveals that a homeowners or condominium association has the authority to assess the property owners and/or land for common expenses, then you must obtain a certification by the governing body that no such charges exist (or it must certify as to the amount due for payment at closing).

**9. Special Schedule A, ORT Form 4445A; Schedule B — Regional Exceptions**

Schedule A - ORT Form 4445A (ORT Form 3991 for the 10/17/98 version) must be used when issuing the Expanded Homeowner's Policies (and Commitments) because that form sets out the deductible amounts (1% of the policy amount or \$5,000.00, whichever is less) and the maximum dollar limits of liability (\$25,000.00) for Covered Risks 16, 18, 19 and 21.

Additionally, both the commitment and the policy should include Schedule B containing exceptions unique to your particular region.

#### 10. Miscellaneous Matters

- a. **Reimbursable Rent, Relocation and Repair Costs:** If the insured cannot use the land because of a claim covered by the policy, the actual rent paid (with certain limitations) will be reimbursed. Also covered are reasonable relocation costs and the cost to repair any damage to personal property because of the relocation. See Conditions, paragraph 6 c(2).
- b. **Increase in Amount of Insurance After Unsuccessful Cure:** The policy automatically increases the amount of coverage by 10% in the event the Company attempts to cure a title defect by bringing or defending a legal action and is ultimately unsuccessful. There is no comparable provision in the 10/17/98 version.
- c. **Automatic Inflation Protection:** The policy automatically increases the amount of coverage 10% per year for the first 5 years, for a total of 150% of the original policy amount. See Conditions, paragraph 9.
- d. **Cost:** When the Expanded Homeowner's Policy is issued, an additional charge will apply to the regular premium rate because of the expanded coverage. In most states the charge will be an additional 10% of the premium amount, but this may vary from state to state. You should refer to your Old Republic rate manual or consult with your supervisory office to determine the additional charge.
- e. **Policy Entire Contract:** Insureds are instructed that, "To determine the meaning of any part of this Policy, You must read the entire policy *and any endorsements*" (emphasis added). See Conditions, paragraph 8.
- f. **Arbitration:** Except as provided in the arbitration forum's rules, an Insured may not join or consolidate his or her claim or controversy with that of another person.

#### 11. Deleting Survey or Future Damage Coverage

In the event that you do not want to provide survey coverage, a general Schedule B survey exception will not accomplish your goal. This is because many of the Covered Risks explicitly extend coverage even if the covered matter is excepted in Schedule B (see Covered Risks 12, 13, 23 and 24). If you want to eliminate any of the coverages extended in the enumerated Covered Risks, you should first consider whether a standard policy would be better suited to the transaction. If the survey coverage poses undue risk, then an Expanded Homeowner's Policy is not going to be an appropriate policy, and a standard owner's policy should be issued instead. Additionally, the survey and future damage coverages are essential additions to the Expanded Homeowner's Policy, and are significant

parts of what differentiates this policy from a standard ALTA Owner's Policy. Accordingly, eliminating these coverages is contrary to the intent and purpose of the Expanded Homeowner's Policy.

### **Additional Exclusions**

The original seven exclusions contained in the Exclusions section of the Expanded Homeowner's Policy have been expanded to nine. The two new matters which are now excluded from coverage are:

1. Loss or damage arising from contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence; and
2. Loss or damage arising from the negligence of any person or Entity exercising a right to extract or develop minerals, water or any other substances.

These same two items have also been added to the Exclusions section of the Expanded Residential Loan Policy.

### **ALTA Limited Pre-Foreclosure Policy and Date –Down Endorsement**

Numerous products exist in the marketplace and are issued to lenders which want to determine the status of title and the identity of parties to be joined as parties in a foreclosure proceeding. The Limited Pre-Foreclosure Policy was developed in an attempt to standardize the coverage available to a lender in a manner which does not expose the title industry to undue risk. This product is a limited search product (as described in more detail below) which gives limited coverage to a lender beginning to conduct a foreclosure sale.

The policy indemnifies a lender against several items regularly found in a search of the Public Records **unless specifically excepted in Schedule B of the Policy**. Those matters include conveyances, Notices of Judicial Proceedings (as defined in the Policy), Notices of Bankruptcy (as defined in the Policy) and mortgages recorded in the Public Records subsequent to the Insured's Mortgage. In addition, coverage is provided as to Judgment Liens (as defined in the Policy) and federal tax liens against the mortgagor(s) recorded before or after recording of the Insured's mortgage provided, again, that there is recorded notice in the Public Records. Lastly, coverage is given as to ad valorem real estate taxes and special assessments imposed by a governmental authority and **due and payable at Date of Policy**.

It is important to note that, except for taxes and assessments, coverage for all other matters in the policy is expressly limited to matters appearing in the Public Records. The Limited Pre-Foreclosure Date Down Endorsement is intended and is available to extend the Policy if an Insured encounters delays in the foreclosure process.

Issuance of the policy requires examination of the Public Records from the date the mortgage or deed of trust was recorded forward. A full search, as appropriate for the state in which the property is located, must be conducted for judgment liens and federal tax liens filed against the mortgagor(s).

It is strongly recommended that state counsel monitor issuance of this product, at least until people understand the product, its scope and its limitations. This product provides an insured title search

covering limited matters spanning a limited time frame. Feel free to direct any inquiries you have with respect to this new policy to the Corporate Legal Department.

### **ALTA Short Form Residential Loan Policy**

The Short Form Residential Loan Policy was revised in light of the changes to the coverage pertaining to damage to surface improvements arising from the extraction of minerals in the ALTA 9 and 35 series endorsements. The policy now covers damage to improvements arising from mining or extraction of minerals in the same manner as the ALTA 9-06 endorsement.

In addition, there is now an opportunity to provide the ALTA 30-06, i.e. One to Four Family Shared Appreciation Endorsement by checking the appropriate box on the Short Form Policy.

### **ALTA Short Form Residential Limited Coverage Junior Loan Policy**

This policy form was slightly revised to state that the policy incorporates all the coverages and all the Exclusions and Conditions of the ALTA Residential Limited Coverage Junior Loan Policy dated 8-1-12. A provision was added after the introductory paragraph for including the name and address of the title insurer. The rest of the form is not substantively changed.

### **ALTA Residential Title Policy (6-1-87)**

This policy has been decertified by ALTA due to its infrequent use throughout the country. Despite the decertification, it may still be issued where filed and currently in use, though it is no longer an official ALTA form.

### **Closing Protection Letters**

Both the Single Transaction and Multiple Transaction Letters have been revised with the goal of making the coverages and the Exclusions more straight forward and easier to understand.

Section 2, the definitional section of each letter, is new and defines certain terms used throughout the letter. These definitions make clear that the terms “Commitment”, “Policy or “Policies” refer to the commitment and policy issued in connection with the specific real estate transaction for which the letter is issued.

An exclusion pertaining to consumer financial laws, as defined federally in 12 USC Sec. 5481 (14), or arising under state law, has been added. Additional exclusions for state or federal laws pertaining to standards or requirements for asset-backed securitization, including credit risk retention have also been added. Acts of an agent in disbursing construction funds are excluded from the coverage of the closing protection letters (though coverage under a title policy might be

implicated) as are acts of an agent as a qualified intermediary in a tax deferred exchange under Section 1031 of the Internal Revenue Code.

The letters also make it clear that a lender must own the Indebtedness secured by an Insured Mortgage both at the time the claim is made and at the time it is paid to recover under the letter.

A new provision was inserted making clear that a Court which is interpreting and enforcing the terms and provisions of the letter must apply the law of the jurisdiction where the Land is located. The letter also states that any litigation or other proceeding to enforce the letter must be brought within the United States or one of its territories having appropriate jurisdiction.

Lastly, the coverage under the letter clarifies that in all cases the coverage ends one year after the date of the transmittal of funds, and underscores that the one year period is not tolled even if there is no prejudice to the Company. Finally, if the Real Estate Transaction for which the letter issued does not close within one year of the date of the letter, the letter ceases to be of any effect.

#### **ALTA Residential Limited Coverage Mortgage Modification Policy**

This new policy provides an ALTA standard form for a product which loan servicers have requested and have previously received in different forms from different underwriters. The product is intended for modifications of loans securing a one-to-four family residential unit.

The policy indemnifies against loss or damage sustained as a result of a determination that: 1) the lien of the Insured Mortgage is invalid or unenforceable solely as a result of the modification of the mortgage; and 2) lack of priority of the lien of the Insured Mortgage arising solely as a result of the Modification.

The policy does **NOT** insure that the Insured Mortgage had any specific priority at the time originally filed or recorded. Nor does it insure that the borrower owns the Land. Exclusions for matters suffered, assumed or agreed to by the Insured Claimant and all other Exclusions contained in Exclusion 3 of the base ALTA 2006 Loan Policy are also included in this policy. The policy also contains a Creditors' Rights Exclusion pertaining to the transaction creating the Modification.

In order to issue this policy, Old Republic National Title requires that the terms of the Mortgage Modification be analyzed to be certain that the modification does not create a novation or otherwise impact priority under the law of the jurisdiction where the real property which is the subject of the modified mortgage is located. Any questions in that regard should be referred to State Counsel for the applicable state.