

An Overview of Title Insurance and Underwriting:

Preparing a Title Commitment and Policy & Eliminating Claims From the Beginning

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The Commitment

Commitment

The purpose of a title commitment is to inform the Lender and/or Purchaser prior to the closing of what title insurance coverage is available if the transaction closes and all requirements in the commitment are satisfied.

Schedule A provides the basic information about the policy to be issued, including the name of the person or entity to be insured, the type of policy to be issued and the property to be insured.

Schedule B-I lists the Requirements. Specific requirements relate specifically to the property to be insured and typically include satisfaction of liens against the property (Mortgages, Judgments, Federal or state Tax Liens, etc.). They may also include clearance of defects or potential title defects.

Schedule B-II lists the Exceptions. The exceptions are for defects and potential defects for which no coverage will be provided by the policy. There are two basic types of exceptions: Standard Exceptions and Specific Exceptions. Standard exceptions are, as a general rule, included in the Policy. Standard exceptions vary for the different types of policies. Insert in the commitment the standard exceptions for the type of policy expected to be issued after closing. Some standard exceptions may be removed with proper underwriting. Specific exceptions specifically relate to the property to be insured.



File Number: **[A]** 16-001

Commitment No: **[B]** VX123456

SCHEDULE A

1. Effective Date: **[C]** *February 1, 2016 at 9:00 A.M.*

2. Policy or Policies to be issued:

a. Loan Policy: **[D]** *Loan Policy (06-17-06)* Amount: \$ **[E]** *100,000.00*

Proposed Insured: **[F]** *Main Street Bank its successors and/or assigns, as their interest may appear*

b. Owner's Policy: **[G]** *Owner's Policy (06-17-06)* Amount: \$ **[H]** *120,000.00*

Proposed Insured: **[I]** *Bob Buyer and Barbara Buyer*



3. The estate or interest in the Land described or referred to in this Commitment is **[J]** *Fee Simple*.

4. Title to the **[K]** *Fee Simple* estate or interest in the land is at the Effective Date vested in:

[L] *Sam Seller*

5. Purchaser: **[M]** *Bob Buyer and Barbara Buyer*

6. The Land referred to in this Commitment is situated in **[N]** *Madison County*, State of **[O]** *Alabama* and is described as follows:

[P] *Lot 1, Pleasant Hills Subdivision, a subdivision, according to a map or plat thereof which is on file of record in the office of the Probate Judge of Madison County, Alabama, in Plat Book 100 at Page 1, reference to which is hereby made in aid of and as a part of this description.*

Commitment- continued

Known risks must be dealt with, thus the need for “requirements” in a commitment.

Make sure all title issues are addressed in the title commitment with clear and thorough requirements (affidavits, curative deeds or other curative documents, recorded releases of prior mortgages, judgments, or tax liens, bankruptcy issues, **review of entity formation and governing documents and appropriate authority requirements, etc.)**

SCHEDULE B - SECTION I Requirements

Showing defects and objections to be removed or eliminated; liens and encumbrances to be satisfied and discharged of record and requirements to be complied with before policy of title insurance can be issued without exception thereto.

[Q] Item 1. Proper instrument creating the interest or estate to be insured must be executed and duly filed for record, to wit:

[R] *Execution and recordation without intervening rights of a Warranty Deed by the present owner (and spouse, when required by law) conveying the Land to the purchaser.*

[R] *Execution and recordation without intervening rights of a security instrument by the purchaser (and spouse, when required by law) to the lender, securing an indebtedness in the sum as shown in Schedule "A" hereof.*

-
- [Q] Item 2. Full consideration for the interest or estate to be insured must be paid to or for the account of grantors or mortgagors.
 - [Q] Item 3. Furnish satisfactory evidence that there are no outstanding mechanics' or materialmen's liens against the property. Examine parties carefully, and attach owners' and contractors' affidavits where there has been construction during the statutory period for liens.
 - [Q] Item 4. Payment of all taxes, charges, assessments , levied and assessed against subject property, which are due and payable.
 - [Q] Item 5. Secure and return executed Notice to Borrower's Regarding Owner's Insurance.
 - [S] *Item 6. Proper satisfaction, cancellation or release of the Land from security instrument executed by Sam Seller to Capital City Bank, recorded in Book 555 at Page 444.*

SCHEDULE B - SECTION II Exceptions

Schedule B of the **[T]** *Loan Policy (06-17-06)* policy to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

- [U]** Item 1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
- [V]** *Item 2. Any prior reservation or conveyance, together with release of damages, of minerals of every kind and character, including, but not limited to, oil, gas, sand and gravel in, on and under the Land.*
- [V]** *Item 3. Any lien, or right to a lien for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.*
- [V]** *Item 4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.*
- [V]** *Item 5. Easements or other uses of subject property not visible from the surface, or easements or claims of easements, not shown by the public records.*
- [V]** *Item 6. Rights or claims of parties in possession not shown by public records.*
- [W]** *Item 7. The restrictive covenants contained in instrument filed for record in Book 123 at Page 543.*

Commitment- Short Form Loan Policy Exceptions

SCHEDULE B - SECTION II

Exceptions

Schedule B of the Short Form Residential Loan Policy (12-12) policy to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

Item 1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.

Item 2. Those taxes and special assessments that become due or payable subsequent to Date of Policy. (This does not modify or limit the coverage provided in Covered Risk 11(b).)

Item 3. Covenants, conditions, or restrictions, if any, appearing in the Public Records; however, this policy insures against loss or damage arising from:

(a) the violation of those covenants, conditions, or restrictions on or prior to Date of Policy;

(b) a forfeiture or reversion of Title from a future violation of those covenants, conditions, or restrictions, including those relating to environmental protection; and

(c) provisions in those covenants, conditions, or restrictions, including those relating to environmental protection, under which the lien of the Insured Mortgage can be extinguished, subordinated, or impaired.

As used in paragraph 2(a), the words “covenants, conditions, or restrictions” do not refer to or include any covenant, condition, or restriction (a) relating to obligations of any type to perform maintenance, repair or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not referenced in an addendum attached to this policy.

Item 4. Any easements or servitudes appearing in the Public Records; however, this policy insures against loss or damage arising from (a) the encroachment, at Date of Policy, of the improvements on any easement, and (b) any interference with or damage to existing improvements, including lawns, shrubbery, and trees, resulting from the use of the easements for the purposes granted or reserved.

Item 5. Any lease, grant, exception, or reservation of minerals or mineral rights appearing in the Public Records; however, this policy insures against loss or damage arising from (a) any affect on or impairment of the use of the Land for residential one-to-four family dwelling purposes by reason of such lease, grant, exception or reservation of minerals or mineral rights, and (b) any damage to existing improvements, including lawns, shrubbery, and trees, resulting from the future exercise of any right to use the surface of the Land for the extraction or development of the minerals or mineral rights so leased, granted, excepted, or reserved. Nothing herein shall insure against loss or damage resulting from subsidence.



Commitment- Owner's Policy Exceptions

Schedule B of the **[X]** *Owner's Policy (06-17-06)* policy to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

- [U]** Item 1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
- [Y]** *Item 2. Any prior reservation or conveyance, together with release of damages, of minerals of every kind and character, including, but not limited to, oil, gas, sand and gravel in, on and under the Land.*
- [Y]** *Item 3. Any lien, or right to a lien for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.*
- [Y]** *Item 4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.*
- [Y]** *Item 5. Easements or other uses of subject property not visible from the surface, or easements or claims of easements, not shown by the public records.*
- [Y]** *Item 6. Rights or claims of parties in possession not shown by public records.*
- [Z]** *Item 7. The restrictive covenants contained in instrument filed for record in Book 123 at Page 543.*
- [Z]** *Item 8. Any mortgage, deed of trust, lease or lien created or assumed by the insured.*

Pre-closing Considerations

Pre-closing Considerations

Some things to double check before closing

- Read lender's closing instructions!
- ISAOA language after lender's insured name; special wording for some
- Million dollar approval form required on large transactions
- Chain of title required by some lenders (usually 12 or 24 months)
- **Do not rely on a bank payoff, release, subordination, etc. unless you get the information directly from the lender! (this is a common claim for MVT)**
- **Pre-closing update if title search is old (safest procedure-always update)**
- **Are you prepared to meet all requirements on or before closing?**
- Verify legal description is attached to new Deed and new Mortgage; verify it is the same description as the one used in the commitment



Pre-closing Considerations

Some things to double check before closing

- Are homeowner's association dues paid (subdivision or condominium)?
- Conduct a Patriot Act search for the names of buyer and seller
 - Transaction will be VOID if parties are on sanctions list
 - **See “Suspected Terrorist List” link on MVT website**
- Foreign Investment in Real Property Tax Act (“FIRPTA”)
 - See 26 U.S.C. §1445 and Treasury Regulation 26 C.F.R. §1.1445-1
 - Does not apply to residential transactions less than \$300,000
 - Generally you will comply if you obtain Non-Foreign Affidavit
 - There are other exceptions and requirements to this Act

Pre-closing Considerations

Some things to double check before closing

- Section 40-18-86, Code of Alabama (1975) provides for income tax withholding on sales or transfers of real property by nonresidents of Alabama.
 - See <http://revenue.alabama.gov/incometax/nonresidentwh.cfm> for rules, procedures and exemptions.

Pre-closing Considerations

Mortgage Checklist

- Names are spelled correctly.
- Names are listed exactly as they are on the vesting deed.
- Grantor is properly identified as married or single.
- All owners of the property are listed in the granting clause of the mortgage.
- Review vesting deed to ensure that everyone that owns an interest in the property also executed the mortgage.
- The principal amount of the underlying note is stated in the mortgage.
- The interest rate is stated. If interest accrues at a variable rate, then the mortgage should recite that "interest accrues at a variable rate."
- Mortgage should be dated.
- On homestead property, the spouse of the borrower must sign the mortgage.
- Legal description has been proofed and is perfect.
- If legal description is to be attached as an exhibit, make sure the legal description is actually attached to the mortgage.
- If legal description is to be attached as an exhibit, make sure the correct legal description gets attached. (It is generally a good idea to type the borrower's name on the top of the legal description to avoid getting the description attached to the wrong mortgage).



Pre-closing Considerations

Mortgage Checklist- continued

- Ask the borrower if there is a mobile home on the property.
- If there is a mobile home on the property, please call Alabama Underwriting Counsel
- Acknowledgement should be dated on or after the date of the mortgage
- County and State on acknowledgement are properly completed.
- Proper form of acknowledgement should be used. (e.g. corporations should not use an individual form of acknowledgement).
- Verify that notary's authority has not expired.
- Correct Indexing instructions are included.
- Instrument prepared by language is included.(Name and address of preparer)
- County of foreclosure is inserted and is the same as the county where the property is located.
- Correct recording fee is included. Mortgage may lose priority if the clerk rejects the mortgage for having the incorrect recording fee.

Policy Issuance

Policy Issuance

Long Form

Old Republic National Title Insurance Company
124 One Madison Plaza, Suite 2100
Madison, MS 39110

SCHEDULE A

Policy Number: **[B]** LX123456

File Number: **[A]** 16-001

Amount of Insurance: \$ **[D]** 100,000.00

Loan No: **[C]** 999123456

Date of Policy: **[E]** February 28, 2016 at 3:45 P.M.

Address Reference: **[F]** 123 Main Street, Madison, AL

1. Name of Insured: **[G]** Main Street Bank its successors and/or assigns, as their interest may appear
2. The estate or interest in the Land that is insured by the Insured Mortgage is: **[H]** Fee Simple
3. Title is vested in: **[I]** Bob Buyer and Barbara Buyer
4. The Insured Mortgage and its assignments, if any, are described as follows:

[J] that certain Mortgage dated February 28, 2016, executed by Bob Buyer and Barbara Buyer to Main Street Bank filed for record in the office of the Probate Judge of Madison County, AL on February 28, 2016 at 3:45 P.M. and recorded in said office in Book 27 at Page 293, securing an indebtedness in the sum of \$100,000.

5. The Land referred to in this policy is situated in the county of **[K]** Madison, State of **[L]** Alabama and is described below or, if no description appears below, is the land described in the instrument(s) set forth in item 4 above.

[M] Lot 1, Pleasant Hills Subdivision, a subdivision, according to a map or plat thereof which is on file of record in the office of the Probate Judge of Madison County, AL, in Plat Book 100 at Page 1, reference to which is hereby made in aid of and as a part of this description.



Policy Issuance

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Old Republic National Title Insurance Company
124 One Madison Plaza, Suite 2100
Madison, MS 39110

6. this policy incorporates by reference those ALTA endorsements selected below:

- ALTA 4-06 Condominium
- ALTA 4.1-06 Condominium
- ALTA 5-06 Planned Unit Development
- ALTA 5.1-06 Planned Unit Development
- ALTA 6-06 Variable Rate
- ALTA 6.2-06 Variable Rate--Negative Amortization
- [N] ALTA 8.1-06 Environmental Protection Lien - Paragraph b refers to the following state statute(s): None
- ALTA 9-06 Restrictions, Encroachments, Minerals
- ALTA 13.1-06 Leasehold Loan
- ALTA 14-06 Future Advance-Priority
- ALTA 14.1-06 Future Advance-Knowledge
- ATLA 14.3-06 Future Advance-Reverse Mortgage
- ALTA 22-06 Location - The type of improvement is a one-to-four family residential structure, and the street address is as shown above.



Policy Issuance

Long Form

Old Republic National Title Insurance Company
124 One Madison Plaza, Suite 2100
Madison, MS 39110

SCHEDULE B - I Exceptions from Coverage

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

Item 1. Any prior reservation or conveyance, together with release of damages, of minerals of every kind and character, including, but not limited to, oil, gas, sand and gravel in, on and under the Land.

Item 2. Any lien, or right to a lien for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

[O] *Item 3. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.*

Item 4. Easements or other uses of subject property not visible from the surface, or easements or claims of easements, not shown by the public records.

Item 5. Rights or claims of parties in possession not shown by public records.

Item 6. The restrictive covenants contained in instrument filed for record in Book 123 at Page 543.

SCHEDULE B - II Subordinate Matters

In addition to the matters set forth in Schedule B - I, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the insured Mortgage:

[P] NONE



Policy Issuance

Short Form Loan

Schedule B of an ALTA Short Form Residential Loan Policy contains pre-printed standardized general exceptions for all Covenants, Conditions and Restrictions (CCR's), Easements and Mineral Interests of record. Each particular covenant, easement or mineral interest does not have to be listed individually with recording information. An Addendum may be added for Subordinate Matters and to add additional exceptions for matters which are not already excepted by the standardized general pre-printed exceptions in Schedule B for CCR's, Easements and Mineral Interests.

The preprinted Standard Exceptions for all CCR's, Easements and Mineral Interests of record state that certain affirmative coverage is provided for each exception. Therefore, all recorded instruments for these matters disclosed by your customary title search, should be reviewed to determine if the coverage provided in Schedule B is appropriate.



Policy Issuance

Short Form

Policy No: [A] MXSF123456		SCHEDULE A	
File Number: [B] 16-001		Title Insurance Co:	Old Republic National Title Insurance Company 124 One Madison Plaza, Suite 2100 Madison, MS 39110
Loan No.: [C] 999123456			
Address Reference:	Street Address:	[D] 123 Main Street	
	County and State:	[E] Madison, AL	
Amount of Insurance: \$ [F] 100,000.00			
Mortgage Date: [G] February 28, 2016			
Mortgage Amount: \$ [H] 100,000.00			
Date of Policy: [I] February 28, 2016 at 1:00 PM			
Name of Insured: [J] Main Street Bank, its successors and/or assigns, as their interest may appear			
Name of Borrower(s): [K] Bob Buyer and Barbara Buyer			
The estate or interest in the Land identified in this Schedule A and which is encumbered by the Insured Mortgage is fee simple and is, at Date of Policy, vested in the borrower(s) shown in the Insured Mortgage and named above.			
The Land referred to in this policy is described as set forth in the Insured Mortgage.			
This policy consists of two pages, unless an addendum is attached and indicated below:			
[L]	<input checked="" type="checkbox"/>	Addendum Attached	
[L]	<input type="checkbox"/>	No Addendum Attached	
The endorsements checked below, if any, are incorporated in this policy:			
	<input type="checkbox"/>	ALTA 4-06	Condominium
	<input type="checkbox"/>	ALTA 4.1-06	Condominium
	<input type="checkbox"/>	ALTA 5-06	Planned Unit Development
	<input type="checkbox"/>	ALTA 5.1-06	Planned Unit Development
	<input type="checkbox"/>	ALTA 6-06	Variable Rate
[M]	<input type="checkbox"/>	ALTA 6.2-06	Variable Rate - Negative Amortization
	<input type="checkbox"/>	ALTA 7-06	Manufactured Housing, if a manufactured housing unit is located on the Land at Date of Policy
	<input checked="" type="checkbox"/>	ALTA 8.1-06	Environmental Protection Lien - Paragraph b refers to the following state statute(s): None
	<input type="checkbox"/>	ALTA 9-06	Restrictions, Encroachments, Minerals
	<input type="checkbox"/>	ALTA 14-06	Future Advance - Priority
	<input type="checkbox"/>	ALTA 14.1-06	Future Advance - Knowledge
	<input type="checkbox"/>	ALTA 14.3-06	Future Advance - Reverse Mortgage
	<input type="checkbox"/>	ALTA 22-06	Location - The type of improvement is a one-to four family residential structure and the street address is as shown above.



Policy Issuance

Short Form Addendum

**ADDENDUM
SHORT FORM RESIDENTIAL LOAN POLICY**

Schedule B (Continued)

Addendum to Policy Number: **[A]** MXSF123456

File Number: **[B]** 16-001

IN ADDITION TO THE MATTERS SET FORTH ON SCHEDULE B OF THE POLICY TO WHICH THIS ADDENDUM IS ATTACHED, THIS POLICY DOES NOT INSURE AGAINST LOSS OR DAMAGE BY REASON OF THE FOLLOWING:

When insuring foreclosed property subject to rights of redemption

[N] *Item __. All rights outstanding by reason of statutory right of redemption from foreclosure of that certain mortgage given by John Q. Public and wife Mary C. Public, to ABC Mortgage Company, recorded in _____ in the Office of the Probate Judge of _____ County, Alabama; said foreclosure being evidenced by foreclosure deed to ABC Mortgage Company, recorded in _____ in said Probate Office. The company does not attempt to set out the names of all the parties entitled to redeem and by accepting this commitment and/or policy, the insured releases the company and its agent of any such duty or obligation.*

When insuring a 1st Mortgage with a simultaneously issued 2nd Mortgage, show the 2nd

[N] *Item __. Mortgage dated _____ executed by John Q. Public and wife Mary C. Public to ABC Mortgage Company, filed for record in _____ in the Office of the Probate Judge of _____ County, Alabama, on _____.*
NOTE: Said mortgage is subordinate to the mortgage insured herein.

When insuring a 2nd Mortgage, Show the 1st

[N] *Item __. Mortgage dated _____ executed by John Q. Public and wife, Mary C. Public to ABC Mortgage Company, filed for record in _____ in the Office of the Probate Judge of _____ County, Alabama, on _____.*

Construction Loan

[N] *Item __. Any lien or right to a lien, for service, labor or materials heretofore or hereafter furnished, imposed by law and not shown by the public records.*

NOTE: Pending disbursement of the full proceeds of the loan secured by the Mortgage insured, this policy insures only to the extent of the amount actually disbursed without knowledge of any intervening lien or interest, but increases as each disbursement is made, up to the face amount of this policy.



General Considerations

General Considerations

- Remit policy and premium to MVT in a timely manner.
- When drafting a deed, tell a story and cite prior deeds. Why?
- Make things easy on the next abstractor. Why?
- You are obligated to deal with any post-closing issues from the lender or parties, even if they occur years later.

Simple Errors Cause Big Hassles

Loss Prevention Generally- continued

2016 Losses?

What has caused the most losses in 2016 so far?

Fraud & Forgery?

Boundary & Access?

Closing Errors?

Search Errors?

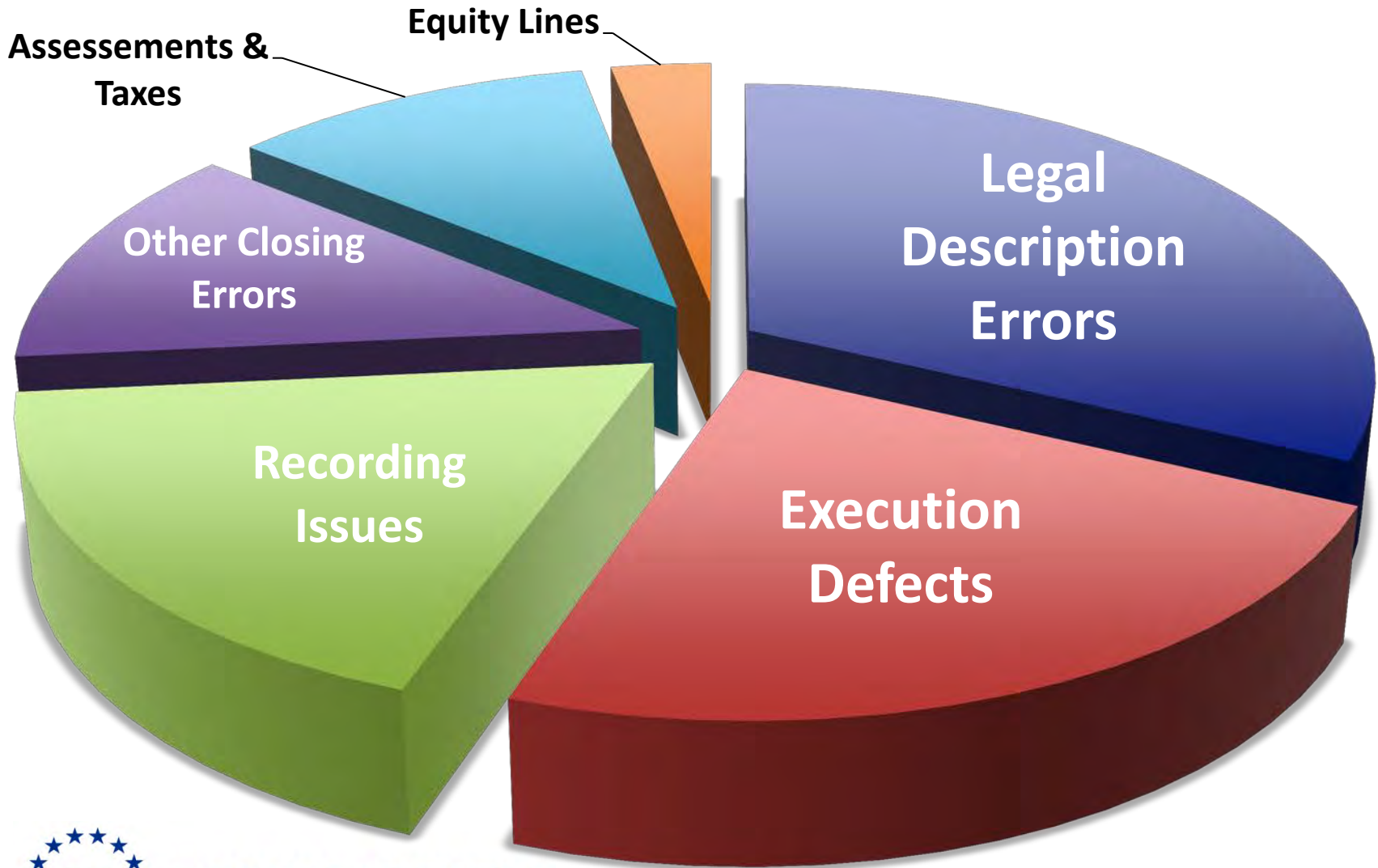
Other?



2016 Loss Payments



2016 Closing Error Losses



Legal Description Errors

- Scriveners Error- Missing or Incorrect Call
- Legal Description Not Attached to Recorded document
- Wrong Legal Attached to Recorded document



Access

Right of Access to a Public Road

Covered Risk 4 in 2006 ALTA Policy provides "[n]o right of access to and from the Land."

Confirm the plat shows the subject property touching a public road.

- If the plat does not show that the subject property touches a public road, confirm there is an easement that connects the subject property to a public road.

If the subject property does not have direct or indirect access, add an exception for lack of access.

Watch out for limited or controlled access where the insured property abuts on an interstate highway or other major artery.

Execution Defects

- Grantor or Mortgagor Does Not Exactly Match Record Title
- Missing Spouse or Marital Status
- Notary Acknowledgment Issues



Execution Defects- continued

- John Green and Jane Blue buy a home. Both John and Jane are grantees on the Deed but only John signs the mortgage.
- John and Jane are married but only John is in title to their Homestead. Jane does not sign the mortgage.
- John and Jane refinance their property. Both appear in the granting clause and sign the mortgage. The Notary Acknowledgment does not include John.



Loss Prevention- Look Twice

Closing Errors can be prevented when the error is caught before the parties leave the table.

- Have another person review the docs when possible
- Address title problems and discrepancies found in your search with the parties in the transaction. If you have multiple parcels and deeds, verify the property to be conveyed and insured.
- **Make sure all title issues are addressed in the title commitment with clear and thorough requirements** (affidavits, curative deeds or other curative documents, recorded releases of prior mortgages, judgments, or tax liens, bankruptcy issues, **review of entity formation and governing documents and appropriate authority requirements, etc.**) **Make sure you are in a position to fulfill all commitment requirements.**



Loss Prevention- Look Twice- continued

Add a step to confirm:

- Legal description matches the commitment and vesting deed, and
- The granting clause, signatures and notary match
- Beware of seller prepared and/or produced deeds, POA's, releases, and lender documents

Make and use lists to check off necessary steps and commitment requirements



Mental Capacity

Mentally incapacitated persons experience a disability that prevents them from executing a legal conveyance or encumbrance of title to real property.

Closers of real estate transactions must be aware of the fact that any instrument can be set aside upon proof that the grantor was mentally incapacitated at the time of its execution.

The following physical signs or characteristics must obligate the closer to cancel the closing of the transaction: amnesia or lack of full memory, drunkenness, drug intoxication, extreme senility, undue influence exerted upon a party by another party.

You closed the transaction, now what?

Review the commitment requirements to see if all were met

- They should all be met or you should not close or an appropriate exception should be made in the policy.

Are all docs properly notarized?

Legal description attached and same as commitment?

Documents signed and dated?

Correct recording fees included? Real Estate Sales Validation Form must be filed in accordance with Section 40-22-1, Code of Alabama, 1975. See <https://revenue.alabama.gov/advalorem/forms/RT-1.pdf>

You closed the transaction, now what? (Continued)

Record all documents promptly

Order a title update

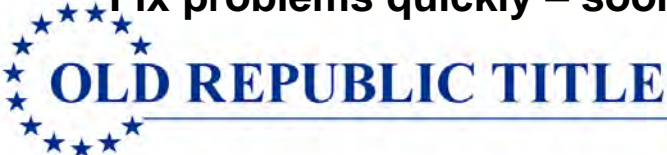
Common items to address:

- Old Mortgage released from proper entity (loan was likely assigned)
- New Mortgage properly recorded without intervening liens
- New Deed properly recorded without intervening liens
- Filed in correct courthouse in correct order? (correct order is critical if you have 1st and 2nd mortgages)
- Taxes Paid?
- Premium for title insurance
- Payment of any other fees/closing costs
- Affidavits signed
- Waiver of Owner's Title Insurance

Are the EXACT same names used on all new documents? If not, re-record or get name affidavits

Issue policies timely. Lenders are becoming more strict about this.

Fix problems quickly – sooner is better than later



Post-Closing - Failing to Timely Record Documents

A bankruptcy trustee can set aside certain transfers made within 90 days (and in some cases 1 year) prior to the filing of the bankruptcy petition. Section 547(b) of the Bankruptcy Code.

- A mortgage falls within Section 547(b) and thus may be avoided.
- However, a bankruptcy trustee can not avoid a mortgage that was recorded within 30 days after the closing.

One court found a settlement agent negligent as a matter of law for failing to record the vesting deed and deed of trust for 6 days. In the 6 day gap, a judgment was recorded against the seller. Huntington Mortgage Company v. Schmenk, 658 N.E. 2d 1109 (Ohio 1995).

Mortgages- Generally

HELOCs - Paying off the HELOC down to \$0 does nothing. It still remains as a line of credit. Look at the request for closing of the HELOC very carefully, and confirm everything is done correctly. Keep copies of everything (**Letter signed by borrower to close account, check, FedEx tracking info, communication to lender, etc.**).

Cancellations - Obtain releases of prior mortgages from the current assignees, and confirm the releases are correct. Be sure to record the releases and keep copies of them.

Subordination Agreements - Make sure that the agreement is correct and executed by the correct parties.

Assignments - Whenever dealing with Assignments in the chain of the Mortgage, confirm there are no breaks in the chain of Assignments and that the Assignments have been recorded.

Homestead

Homestead

- Section 6-10-3, Ala. Code (1975) entitled “Alienation by Married Persons” has the effect of requiring both spouses to execute a mortgage, deed or other conveyance, **if the property is homestead, or else the conveyance is void.**
 - Therefore, always require that both spouses join in the execution of a conveyance of homestead property, even if title is vested in only one of the spouses.
 - If you can satisfy yourself that the property in question is not part of the homestead of either spouse, you may insure without the non-titled spouse joining in the execution of the conveyance. The deed or mortgage should make a recital similar to the following:

Subject property is not part of the homestead of the grantor or the spouse of the grantor.

Purchase Money Mortgages

All mortgages must show the marital status of the grantors and must indicate the individual who prepared the mortgage. Section 35-4-110 (1975). For insurability purposes, the mortgage must state the marital status of the mortgagor(s) or contain non-homestead language. A mortgage executed by a married person must contain the non-homestead language or also be executed by the spouse of the mortgagor.

Under Alabama Case Law, however, a non-titled, non-borrowing spouse is not required to join in the execution of a full Purchase Money Mortgage (PMM) for the purchase of homestead property. ORT prefers that both spouses sign the mortgage. But in those cases where execution by both spouses is not feasible, the PMM may be insured as executed by the titled spouse only and without exception, provided the Agent:

Purchase Money Mortgages- continued

- Determines that the entire proceeds of the mortgage are being applied toward the purchase of the insured land,
- Requires PMM wording to that effect to be inserted in the mortgage,
- Verifies that the lender will accept the PMM as executed, and
- Double checks the vesting deed to verify that title has not been vested in both spouses.

Purchase Money Mortgages- continued

The mortgage should make a recital similar to the following:

“This is a Purchase Money Mortgage. The entire proceeds of the loan are being applied toward the purchase of the herein described real property being conveyed simultaneously herewith.”

It is also advisable to make a similar recital in the deed to the one spouse only, as follows:

“The purchase of the herein described real property is being financed in whole or in part by the proceeds of a Purchase Money Mortgage being executed simultaneously herewith.”

Purchase Money Mortgages- continued

The marital status of the mortgagor must still be shown.

A refinance of the Purchase Money Mortgage does require the signature of the non-titled spouse, and both spouses must be shown in the granting clause of the mortgage, as would be the case for a deed if the property were subsequently sold and the person in title is married.

Foreclosure Issues

A valid foreclosure of a mortgage cuts off and extinguishes junior liens and encumbrances unless the junior lienholders redeem during the statutory right of redemption period. Exception – **A special procedure must be followed to extinguish a subordinate federal tax lien or a subordinate SBA lien.**

Right of Redemption for All Properties except for “Homestead Property” Subject to Act No. 2015-79:

- One (1) year from the date of foreclosure

Foreclosure – Continued

Right of Redemption on “Homestead Property” Subject to Act No. 2015-79:

- 180 days from the date of foreclosure, **if notice as required by the Act is provided**

Applicability. Act No. 2015-79 became effective on January 1, 2016. It applies only to foreclosure sales of homestead property, as defined in the Act, **made pursuant to mortgages dated on or after January 1, 2016.**

Homestead Property. For redemption purposes, homestead property is defined as **residential property on which a homestead exemption was claimed in the tax year during which the foreclosure sale occurred.**

Foreclosure- continued

Notice Requirements. Actual notice to the mortgagor is now required and additional language must be added to the published notice already required under other statutes.

- **Actual notice- Notice of the right of redemption and other rights in the substance as set out in the Act** must be mailed to the mortgagor(s) at the address of the property to be foreclosed at least 30 days prior to the foreclosure by certified mail with proof of mailing.
- **Notice by publication- The required wording regarding redemption and other rights** must now be included in the published notice required under Section 35-10-13, Code of Alabama, 1975.

Foreclosure- continued

Consequences of Failure to Provide Required Notices. Fulfillment of the notice requirements of the Act is critical.

- Failure to give the notices required under the Act, or a defective notice, does not affect the validity of the foreclosure , including the transfer of title to the property.
- There is a two year time period after the date of the foreclosure to bring an action related to the notice requirements, or the action is barred.
- **The reduced period to redeem of 180 days does not begin to run until the newly required notices are given, and failure to provide the required notices could extend the period to redeem to up to two years.**

Foreclosure- continued

With respect to the Right of Redemption Period on “Homestead” Property subject to Act No. 2015-79, **the following is required prior to underwriting as if the redemption period is 180 days from the date of foreclosure:**

- Verify that the foreclosed mortgage is dated on or after January 1, 2016.
- Verify that the foreclosed property was assessed as homestead property in the tax year during which the foreclosure occurred.
- Require satisfactory proof that notice **in the substance as set out in the Act** was mailed to the mortgagor(s) at least 30 days prior to FC at the property address of the foreclosed property by certified mail; AND that the required language was included in the published notice.

Foreclosure- continued

Title Insurance Exception for Redemption Rights

An exception for redemption rights must be included in all title policies issued on foreclosed property subject to rights of redemption. This exception May Not be removed during the redemption period under any circumstances.

Affirmative Coverage over Rights of Redemption

- Available only to institutional lenders in Loan Policies under approved circumstances.
- The Loan Policy must still include an exception for Redemption Rights, followed by coverage against loss to the insured lender if redemption occurs and the debt of the insured mortgage is not fully paid.



Foreclosure- continued

- Circumstances under which affirmative coverage may be approved for a Loan Policy are:
 - The bid amount at the foreclosure sale is more than the resale price and the loan amount of the proposed transaction; or
 - A bond is obtained naming Old Republic National Title Insurance Company as an obligee providing indemnification against loss due to an exercise of the right of redemption. Said bond to be in form and content satisfactory to the Company, or
 - An indemnity from the seller, if said seller is an institutional lender and the indemnity agreement and the indemnitor have been approved by Underwriting Counsel prior to closing.
- Have the Purchaser execute a Purchaser's Disclosure Statement

Foreclosure- continued

Other Foreclosure Title Considerations

- Verify that title to the property under the mortgage was vested in the mortgagor at the time the mortgage was executed. All persons vested in title must execute the mortgage, whether or not the property is homestead property. Make sure all signatories are included in the notary acknowledgment(s).
- Check the legal description in the mortgage against the legal description in the vesting deed to ensure that there are no discrepancies.
- Review the notary acknowledgment to ensure that it complies with Alabama law. Ala. Code §35-4-29 provides the forms for Alabama notary acknowledgments. If an instrument was executed outside the state of Alabama and the acknowledgement does not comply with Alabama law, but complies with the law of the state in which it was executed, it will be considered valid in Alabama. Ala. Code § 35-4-26(b).

Foreclosure- continued

- Review the foreclosure deed for proper execution and for the correct legal description. Check the foreclosure deed against the mortgage to ensure the terms and conditions of sale, and the notice provisions of the mortgage were complied with. Count the days from the date that the first publication ran to the date of the actual sale to make sure the publication is in compliance with §§ 6-8-61 and 6-8-62. Remember, you do not count the day that it first ran in the newspaper in the total days.
- The mortgage to be foreclosed must be recorded in the Probate Office in the county where the property under the mortgage is located. Ala. Code § 35-4-62(a) (1975).
 - When there is more than one courthouse in the county in which the property is located, if the mortgage is recorded after August 1, 2004, the mortgage may be recorded at either courthouse.

Foreclosure- continued

- If the mortgage to be foreclosed is recorded before August 1, 2004, and is recorded in the incorrect division of the county, the mortgage needs to be re-recorded in the proper division of the county before starting foreclosure proceedings. If the original mortgage cannot be obtained, a certified copy of the mortgage may be recorded in the correct division.
- Obtain evidence of non-applicability of the **Servicemembers Civil Relief Act** ("SCRA") (which, subject to certain exceptions, prohibits a non-judicial foreclosure of a mortgage when the mortgagor is in active military duty) and **§35-10-71, Ala. Code (1975)(Pre-foreclosure Mourning for Deceased Service Members)** or compliance therewith, if applicable. The website to determine whether the mortgagor is in active military duty is <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.

Divorce/Dissolution of Marriage

In Alabama, dissolution of marriage or divorce can and often does have an effect on title to real property.

Divorce Decree.

It is always best to require the spouse being divested of the property to sign a Deed conveying the property to the other spouse. However, if a deed is not executed and recorded at the time of divorce, and the former spouse is now unavailable or uncooperative, ORT may be willing to insure based on recordation of a certified copy of the Divorce Decree. The Decree must fully and specifically **divest** one spouse of the property, **AND vest** title into the other spouse.

Will Provisions for Spouse.

Section 43-8-137, Code of Alabama (1975) states that a divorce or annulment operates as a revocation of that part of the will made during the marriage that provides for the other spouse.

Effect on Survivorship Deeds.

Until the passage of Alabama Act No. 2015-312, which went into effect on September 1, 2015, a divorce judgment alone did not automatically destroy a joint tenancy with right of survivorship. **Act No. 2015-312 deals with the effect of divorce or annulment on property held as joint tenants with the right of survivorship, and on certain transferable property rights.**



Divorce/Dissolution of Marriage- continued

Effect on Survivorship Deeds- continued.

With regard to severance of joint tenancies with rights of survivorship, the Act states that except as provided by the express terms of a governing instrument (such as the Deed), a court order, or a contract between the divorcing parties, the divorce or annulment of a marriage severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common.

To protect certain third parties, the Act states that a severance under subdivision (2) of subsection (b) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership. **Unfortunately, the Act is somewhat broad and rather vague with regard to the form the writing declaring the severance must take.**

Divorce/Dissolution of Marriage- continued

Effect on Survivorship Deeds- continued. If your transaction involves a surviving spouse under a deed where the married couple held title as joint tenants with the right of survivorship, require an Affidavit of Continuous Marriage to be recorded or include a certification of continuous marriage in the Deed from the surviving spouse. The affidavit or deed should state that the parties to the survivorship deed were not divorced during any of the time they held title under the survivorship deed. If you are furnished a death certificate for the deceased spouse, also pay particular attention to the marital status of the deceased noted on the certificate. If an affidavit, a death certificate or other information available to you discloses that the parties were divorced during any of the time they held title as joint tenants under the survivorship deed, require satisfactory proof that none of the documents in connection with the divorce proceedings contain express provisions that nullify the effect of this Act to sever the joint tenancy with the right of survivorship held by the parties under the survivorship deed. **If the parties were divorced and none of the pertinent documents specifically alter or undo the severance effect of this Act, underwrite as if the parties to the deed held title as tenants in common, and not as joint tenants with the right of survivorship.**

Underwriting consequences?



Estates

Generally.

Be sure to look through the estate file for these issues:

- Errors in the file.
- Notice to creditors.
- Pay creditors.
- Pay proceeds to estate.
- All beneficiaries or devisees must sign unless title is insurable with a deed from a duly authorized Personal Representative under a will.
- Personal Representative given authority to sell real property?
- Are trusts created by will?

Estates- continued

Sale of Real Property by Personal Representative under Power of Sale in Will.

It has been our typical underwriting practice to insure deeds out of personal representatives under powers of sale in wills only when 1) **there is no known controversy regarding the proposed sale (ask pertinent questions and review the probate case files for waivers and for any adverse motions and orders)**; 2) the power to sell real property is clearly granted to the personal representative by the terms of the will; and 3) the devise of real property is general in nature, i.e., a devise of all real property or when the real property is part of the residual estate. If the real property is specifically devised and the personal representative plans to sell it to a third party, it is a better and safer practice to require the devisees to join in the conveyance to the third party or to give quit claim deeds. Or in the alternative, to require the personal representative to obtain an order from the probate court authorizing the sale after notice to the devisees.



Estates- continued

Devolution of Estate at Death.

Real property devolves to those named in the will or if the decedent died intestate, it devolves to the decedent's heirs. This means that real property vests in the devisees or heirs at the moment of death. Ala. Code § 43-2-830 (1975). Because property vests at the time of death, a judgment lien against a devisee or heir would attach, unless one of the exceptions provided for in Sections 43-2-830(c) and 43-2-442-444 of the Code of Alabama (1975) applies.

Remember to search for judgments, tax liens, etc. against the heirs or devisees of the decedent. Any such liens will attach to that person's interest in the decedent's real property unless one of the above referenced exceptions is applicable. Contact Underwriting Counsel for guidance to determine if liens attach, and if not, how to establish of record that one of the exceptions is applicable.



Estates- continued.

Heirship Affidavits.

Guidelines for Reliance on Heirship Affidavits:

If asked to insure a title which is involved in an unadministered estate, a policy may be issued on title established by Heirship Affidavits if the following conditions are met:

- (a) Affidavits are obtained from at least two disinterested and credible persons,
- (b) The affiant knew the deceased during his entire adult life,
- (c) The affidavits are legally sufficient to establish the heirship and intestacy of the estate of the deceased, and
- (d) The affidavits are recorded in the Probate Office of the county in which the real property to be insured is located.



Estates- continued

Creditor Notice and Claims Against the Estate.

There are two required means of notice: notice by publication and actual notice. Sections 43-2-60, 43-2-61, and 43-2-350, Alabama Code (1975), provide for the giving of actual notice, within six months of the grant of letters, to all persons having claims against the decedent who are known or reasonably ascertainable. The code also gives any creditor entitled to actual notice 30 days after notice to present a claim, which effectively extends the period for filing claims to seven months from the grant of letters for creditors receiving actual notice on the last day of the six-month period.

If the debt is known or reasonably ascertainable and no notice is given, the period for filing claims against the estate is extended to two years from the date of death pursuant to Section 6-2-41, Alabama Code (1975).

Therefore, when insuring title to property that was subject to estate proceedings within the last two years, an exception should be made for possible unprobated creditors' claims as follows:

"Item _____. Any unprobated claims of creditors against the estate of _____, deceased."



Estates- continued

Creditor Notice and Claims Against the Estate- continued.

WE WILL CONSIDER OMITTING THIS EXCEPTION OR GIVING AFFIRMATIVE COVERAGE OVER THIS EXCEPTION ON A CASE-BY-CASE BASIS IF:

- (a) We are furnished an acceptable NOTICE TO CREDITORS AFFIDAVIT, and
- (b) We are furnished an indemnity by the personal representative and/or the beneficiaries of the estate or the heirs of the deceased in acceptable form. Depending on the circumstances, we may require that the net proceeds of the sale be placed in escrow for a period of time. An alternative to indemnification with escrow, if necessary, is an acceptable bond from a national bonding company naming Old Republic National Title Insurance Company as the obligee.

Requests to omit or give affirmative coverage over this exception should be submitted to Underwriting Counsel for guidance and approval.



Powers of Attorney

Alabama has enacted the Uniform Power of Attorney Act. It is codified in Section 26-1A-101 *et seq.* of the Alabama Code and became effective January 1, 2012. It applies to all POA's executed on or after January 1, 2012. POA's executed prior to January 1, 2012 are governed by prior law.

It is imperative for title agents to be familiar with the default and other pertinent provisions of the Alabama Uniform Act. Title agents should also have a working knowledge of the differences between this Act and prior law.

POA's- continued

Some of the significant changes or other provisions in the Act that affect real estate transactions are as follows:

- **Durability.** POA's under the Act are now presumed to be durable. A POA created on or after January 1, 2012 is durable unless the POA expressly provides that it is terminated by the incapacity of the principal. Conversely, POA's created before January 1, 2012 are not presumed durable and to be durable, require a statement of durability in the POA.

POA's- continued

- **Validity.** Under the Act, POA's executed in other states are valid in Alabama if the execution complied with either the law of the jurisdiction in which the POA was executed, the requirements for a military POA or **with Alabama law.**
- **Meaning and Effect.** However, the meaning and effect of a POA is determined by the law of the jurisdiction indicated in the POA, and in the absence of a statement of governing law in the POA, by the law of the jurisdiction in which the POA was executed. This distinction is important since the law of another jurisdiction may provide for different default rules or interpretations with respect to durability of the POA, the scope of authority conferred on an agent by the POA, etc.

POA's- continued

- **Acknowledgment and Recordation.** Although notarization of the principal's signature is not required to create a valid POA under the Act or under prior law, it is strongly encouraged by the parameters of these laws and typically required by ORT. Section 105 of the Act accords acknowledged signatures a statutory presumption of genuineness. Sections 119 and 120 of the Act provide parameters for statutorily protected reliance on and refusal of "Acknowledged POA's" only. Under prior law, POA's which are executed (i.e., signed, dated and acknowledged) with the same formalities as a conveyance and are recorded, are self-proving instruments and must be received as evidence to the same extent as conveyances. For underwriting purposes, **ORT wants the presumptions and protections afforded by Alabama law for acknowledged and recorded POA's.** Recordation of the POA is also important for marketability purposes.

POA's- continued

- **Co-Agents and Successor Agents.** Section 108 of the Act provides default rules for the authority of co-agents and successor agents. **If the principal designates two or more persons to act as co-agents, unless the POA otherwise provides, each agent may exercise his or her authority alone.** With respect to POA's executed prior to January 1, 2016, it has been the underwriting practice of ORT to require all co-agents to execute conveyances of real property , unless the POA expressly provides that a co-agent may act alone. Section 111(b) of the Act also provides that, unless the POA otherwise provides, a successor agent has the same authority as that granted to the original agent, and may not act until all predecessor agents are no longer serving as agents.

POA's- continued

Termination

- **Termination.** Section 110 of the Act sets out the events under which a POA, or an agent's authority, is terminated. Title agents should be familiar with these events of termination under the Act, most of which are consistent with prior Alabama law.
 - Section 110(b)(3) of the Act. This section of the Act provides that a spouse-agent's authority is revoked when an action is filed for divorce or annulment of the agent's marriage to the principal or their legal separation, unless the POA otherwise provides

POA's- continued

Termination- continued

- Alabama Act No. 2015-312 (Divorce or Annulment). This Act became effective on September 1, 2015 and deals in part with the effect of divorce or annulment on revocable nominations made by a divorced individual in a governing instrument (such as a POA) prior to the divorce or annulment, nominating the divorced individual's **former spouse or a relative of the former spouse** to serve in any representative or fiduciary capacity, such as an agent under a Power of Attorney. Except as provided otherwise by the express terms of a governing instrument, such as a Power of Attorney, a court order or a contract between the former spouses, a divorce or annulment (but not a legal separation) under this Act revokes a prior nomination by the divorced individual of **his or her former spouse or a relative of the former spouse** to act in a representative or fiduciary capacity for the divorced individual.

POA's- continued

Termination- continued

A governing instrument revoked solely by divorce or annulment under this Act is revived by the divorced individual's remarriage to his or her former spouse or by the nullification of the divorce or annulment. In the case of a revoked nomination in a fiduciary or representative capacity, provisions of a governing instrument, such as a POA, are given effect as if the former spouse or relatives of the former spouse died immediately before the divorce or annulment. **Use the Agent's Certification form to be recorded to address the issues created by this Act, and Section 110(b)(3) of the Alabama Uniform Power of Attorney Act.**

POA's- continued

Authority

- **Authority.** Article 2 of the Act provides the default statutory construction for authority granted in a POA created on or after January 1, 2012.
 - General Authority. ORT will not typically insure a conveyance by POA if the POA was executed before January 1, 2012, and it does not specifically state that the agent has the authority to sell or mortgage real property. The Alabama Uniform Act, however, provides that a grant of “general authority” in a POA is considered to be comprehensive **unless otherwise limited by the Act or the express terms of the POA.** Sections 204 through 217 describe the authority of an agent under a grant of general authority with respect to various subject matters, including real property (Section 204). Section 201(c) authorizes

POA's- continued

Authority- continued

a POA to contain a grant of “authority to do all acts that a principal could do”, and appears to interpret this broad and general grant of authority to include, but not be limited to, all of the subject matters and authority described in Sections 204-217, unless otherwise provided in the POA. Section 202 authorizes a Power of Attorney to incorporate by reference the subject matter of one or more of Sections 204 through 217. The principal may in the power of attorney limit the effect of a grant of general authority or modify any authority incorporated by reference.

Section 201(a) of the Act enumerates **the acts that may be authorized only by express grants of authority in the POA.**

POA's- continued

Authority- continued

- Express Grants of Authority Required. Section 201(a) of the Act identifies the acts that may be authorized only by an express grant of authority to the agent in the POA.
 - The most noteworthy of the acts that require express authorization for title insurers are subsections (a)(1) **create, amend, revoke or terminate an inter vivos trust**, (a)(3) **create or change rights of survivorship**, (a)(5) **delegate authority granted under the POA**, and (a)(7) **exercise fiduciary powers that the principal has authority to delegate**,

POA's- continued

General Underwriting Practices

For your convenience, below are some of the general underwriting practices of ORT that apply regardless of whether the POA is governed by the Alabama Uniform Power of Attorney Act or by prior law.

In order to insure a conveyance or encumbrance executed by a POA, or a title conveyed under a POA:

- Require the POA to be or confirm that it has been properly acknowledged.
- Require recordation of the original POA in the Probate Office in which the insured land is situated.
- Require and record an Agent's Certification/Affidavit of Non-Revocation from the agent stating that the agent has no knowledge of the death of the Principal, or of the revocation or termination of the POA or the agent's authority under the POA.

POA - continued

General Underwriting Practices- continued

- Review the POA for authority and limitation on the authority of the agent to deed or mortgage real property.
- Determine if the Principal is/was competent or incompetent at the time of conveyance by POA.
 - If incompetent:
 - Review the POA to determine that it is a Durable POA.
 - Obtain an affidavit from the Doctor that the Principal was competent at the time of execution of the POA if the POA was executed by the Principal close in time to the conveyance by POA, or if you have information or belief that the Principal was incompetent on the date of the execution of the POA.

POA – continued

General Underwriting Practices- continued

- Carefully scrutinize the signature and Notary Acknowledgment for due execution.
 - If you have information or belief, for example, that the POA may be forged or executed by an incompetent Principal, do not insure the transaction until satisfactory evidence to the contrary is obtained.
 - **If the POA is secured and brought to you by a party interested in the transaction to be insured, independently verify its due execution.**

POA - continued

General Underwriting Practices- continued

- Carefully review POAs created under other laws.
- Real closing instructions carefully.
 - Some lenders prohibit the use of a POA in a loan closing or require prior review and approval of the POA.
 - Lenders also typically require the POA to be specific to the loan transaction.

POA's - continued

Statutory Form (Partial)

Grant of General Authority

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975:

If you wish to grant **general authority** over all of the subjects enumerated in this section you may SIGN here:

(Signature of Principal)

OR

If you wish to grant **specific authority** over less than all subjects enumerated in this section you must INITIAL by each subject you want to include in the agent's authority:

- ___ Real Property as defined in Section 26-1A-204
- ___ Tangible Personal Property as defined in Section 26-1A-205
- ___ Stocks and Bonds as defined in Section 26-1A-206
- ___ Commodities and Options as defined in Section 26-1A-207
- ___ Banks and Other Financial Institutions as defined in Section 26-1A-208
- ___ Operation of Entity or Business as defined in Section 26-1A-209
- ___ Insurance and Annuities as defined in Section 26-1A-210
- ___ Estates, Trusts, and Other Beneficial Interests as defined in Section 26-1A-211
- ___ Claims and Litigation as defined in Section 26-1A-212
- ___ Personal and Family Maintenance as defined in Section 26-1A-213
- ___ Benefits from Governmental Programs or Civil or Military Service as defined in Section 26-1A-214
- ___ Retirement Plans as defined in Section 26-1A-215
- ___ Taxes as defined in Section 26-1A-216
- ___ Gifts as defined in Section 26-1A-217



POA's – continued

Statutory Form (Partial)- continued

Grant of General Authority

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975:

If you wish to grant **general authority** over all of the subjects enumerated in this section you may SIGN here:

(Signature of Principal)

OR

If you wish to grant **specific authority** over less than all subjects enumerated in this section you must INITIAL by each subject you want to include in the agent's authority:

_____ Real Property as defined in Section 26-1A-204



POA's – continued

Statutory Form (Partial) - continued

Grant of Specific Authority (Optional)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. **INITIAL the specific authority you WANT to give your agent.)**

_____ Create, amend, revoke, or terminate an inter vivos trust, by trust or applicable law

_____ Make a gift which exceeds the monetary limitations of Section 26-1A-217 of the Alabama Uniform Power of Attorney Act, but subject to any special instructions in this power of attorney

_____ Create or change rights of survivorship



POA's – continued

Statutory Form (Partial) - continued

___ Create or change a beneficiary designation

___ Authorize another person to exercise the authority granted under this power of attorney

___ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

___ Exercise fiduciary powers that the principal has authority to delegate



POA's – continued

Statutory Form (Partial) - continued

Limitations on Agent's Authority

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

Limitation of Power. Except for any special instructions given herein to the agent to make gifts, the following shall apply:

(a) Any power or authority granted to my Agent herein shall be limited so as to prevent this Power of Attorney from causing any Agent to be taxed on my income or from causing my assets to be subject to a “general power of appointment” by my Agent as defined in 26 U.S.C. § 2041 and 26 U.S.C. § 2514 of the Internal Revenue Code of 1986, as amended.

(b) My Agent shall have no power or authority whatsoever with respect to any policy of insurance owned by me on the life of my Agent, or any trust created by my Agent as to which I am a trustee.



POA's – continued

Statutory Form (Partial)- continued

Special Instructions (Optional)

You may give special instructions on the following lines. For your protection, **if there are no special instructions write NONE in this section.**

Effective Date

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

POA's – continued

Statutory Form (Partial) - continued

Signature and Acknowledgment

(Signature of Principal)

Your Signature Date: _____

Your Name Printed: _____

Your Address: _____

Your Telephone Number: _____

State of _____

County of _____

I, _____, a Notary Public, in and for the County in this State, hereby certify that _____, whose name is signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents of the document, he or she executed the same voluntarily on the day the same bears date.

Given under my hand this the ____ day of _____, 2____. (Seal, if any)

Signature of Notary

My commission expires: _____



POA's – continued

Statutory Form (Partial) – continued

Important Information for Agent

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) act in good faith;
- (3) do nothing beyond the authority granted in this power of attorney; and
- (4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as “agent” in the following manner:
(Principal's Name) by (Your Signature) as Agent



POA's - continued

Agent's Certification Form (Partial)

AGENT'S CERTIFICATION AS TO THE VALIDITY
OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of _____

County of _____

I, _____ (Name of Agent), certify under penalty of perjury that _____ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated _____.

I further certify that to my knowledge:

- (1) The Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
- (2) If the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
- (3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and
- (4) _____



Trusts

The Alabama Uniform Trust Code became effective on January 1, 2007 and is codified in Title 19, Chapter 3B, of the *Code of Alabama*.

Creation of Trusts. Sections 19-3B-401 and 402 provide the criteria for a trust to be validly created in Alabama. A trust concerning land must be in writing and signed by its creator, or by his or her agent or attorney lawfully authorized to do so in writing. Section 19-3B-1301.

Settlors. The creator of a trust in Alabama is referred to as the “settlor” and a settlor includes anyone who “creates, **or contributes property to,** a trust”. Section 19-3B-103(16).

Trusts- continued

Powers of Trustees & Delegation of Trustee's Duties

Powers of the Trustee. The specific powers of the trustee are delineated in Section 19-3B-816. These powers , however, are subject to the fiduciary limitations of Section 19-3B-815 and **to the express provisions of the trust.**

As for real property, the trustee's powers under Section 816 specifically include among other powers the ability to acquire or sell property, and to borrow money and mortgage trust property.

Delegation of Trustee's Duties. Under Section 19-3B-807, a trustee may delegate his or her fiduciary duties to another person or entity. However, Section 26-1A-201(a)(7) of the Alabama Uniform POA Act

Trusts- continued

Delegation of Trustee's Duties- continued

provides that the authority to exercise fiduciary powers that the principal has the authority to delegate may **only be authorized by an express grant of authority from the principal to the agent in the POA.**

- You should not insure a transaction from an agent acting for a principal in the principal's capacity as the trustee of a trust without a careful review of the POA, a Certification of Trust, and any relevant portions of the trust document which pertain to delegation of duties by the trustee.
- Also, make sure the POA expressly authorizes the agent to exercise fiduciary powers that the principal has the authority to delegate and further review the POA for any limitations on the authority of the agent.

Trusts- continued

Delegation of Powers of Settlers. Section 19-3B-602(e) of the Alabama Uniform Trust Code provides that the power of a settlor with respect to revocation, annulment, or distribution of trust property **may be exercised by an agent under a POA only to the extent expressly authorized by the terms of the trust.**

Under Section 26-1A-201(a)(1) of the Alabama Uniform Power of Attorney Act, the authority to create, amend, revoke or terminate an inter vivos trust **may only be authorized by an express grant of authority from the principal to the agent in the POA.**

- To rely on any of the above referenced actions by an agent under a POA on behalf of a settlor of a trust, you should carefully review the POA, and relevant portions of the trust document for express authorization.

Trusts- continued

Revocable Trusts

Revocable Trusts. Under Section 19-3B-602(a) of the Uniform Trust Code, if the instrument is silent as to the revocability of the trust, the trust is presumed to be revocable. Please note that unless the terms of the trust instrument specifically provide that the trust is irrevocable, the settlor may amend or revoke the trust. This is a complete change of prior Alabama law, but it is not retroactive to trusts in existence before January 1, 2007.

- **This is significant in that the property of a revocable trust is subject to the claims of the settlor's creditors during the lifetime of the settlor.** Section 19-3B-505. The property of a trust that is revocable immediately prior to the settlor's death is also subject to the lawful claims of the settlor's creditors and other expenses usually attributable to the settlor's estate upon the death of the settlor.

- **Trusts- continued**

Revocable Trusts- continued

- **Anyone who meets the definition of a settlor should be run for judgments, tax liens, etc., when the property is searched in a transaction where the property to be insured is held by or is to be held by a revocable trust through its trustee(s).**

Trusts - continued

Certification of Trust

Certification of Trust. The Uniform Trust Code provides that instead of furnishing a complete copy of the trust, a trustee may provide a Certification of Trust, which may be relied upon by third parties in good faith. Section 19-3B-1013 provides that a “Certification of Trust” may be furnished and relied upon **if it is executed by the trustee and contains the information set forth in Section 1013.**

- Identification of the beneficiaries of a Trust is not required to be disclosed in the Certification of Trust. However, for an Alabama trust to be validly created under the Uniform Trust Code, it must have a definite beneficiary, in most cases, and the same person may not be the sole trustee and the sole beneficiary of the Trust. Therefore, **it is advisable to have the trustee state in the Certification of Trust that there is a definite beneficiary of the Trust, and that the same person is not the sole Trustee and sole beneficiary of the Trust.**

Trusts- continued

Certification of Trust- continued

- **It is critical to identify all known settlors of the trust in the certificate.** The preparer of the Certification of Trust should be informed that a settlor under Alabama law includes not only the creator of the trust, but also anyone who has contributed real or personal property to the trust. It is also important for the trustee to indicate in the certificate if a settlor of the trust is deceased.
- Require a Certification of Trust that complies with Section 19-3B-1013 from a currently acting trustee of the trust to be recorded in the Probate Office of the County in which the land is located.
- **Require the Certification of Trust to include excerpts from the trust document which empower the current trustee(s) to act in the pending transaction.** Request other pertinent portions of the trust document if needed.

Trusts- continued

Certification of Trust- continued

- Reserve the right to make further requirements or exceptions after you have received and reviewed the Certification of Trust, along with portions of the trust document requested and/or received.
- Review the Certification of Trust, and pertinent portions of the trust document, if needed, for compliance with Section 19-3B-1013, and to determine that the trustee has the power to act in the pending transaction (either alone or in concert with co-trustees) and whether the trust is revocable or irrevocable.
- If revocable, recorded liens against all settlors of the trust will also attach to the settlor's interest in the land as if the trust had not been created. Run any settlor of the trust when searching title for judgments, tax liens, etc.

Trusts- continued

Certification of Trust- continued

- If you have been provided with a compliant Certification of Trust and relevant excerpts from the trust document, you should not have to require the actual trust document in most instances. To do so indiscriminately, could subject you to liability for damages. Section 19-3B-1013(h).
- **ORT requires the Certification of Trust to be recorded for insurability and marketability purposes.** You should redact the trust's taxpayer's identification number prior to recordation.

Trusts- continued

Alabama Act No. 2015-312 (Effect of Divorce or Annulment)

- Alabama Act No. 2015-312 (Divorce or Annulment). This Act became effective on September 1, 2015 and deals in part with the effect of divorce or annulment on revocable nominations made by a divorced individual in a governing instrument (such as a Trust) prior to the divorce or annulment, nominating the divorced individual's **former spouse or a relative of the former spouse** to serve in any representative or fiduciary capacity, such as a Trustee under a Revocable Trust. Except as provided otherwise by the express terms of a governing instrument (such as a Trust), a court order or a contract between the former spouses, a divorce or annulment under this Act revokes a prior nomination by the divorced individual of **his or her former spouse or a relative of the former spouse** to act in a representative or fiduciary capacity for the divorced individual. A

Trusts- continued

Alabama Act No. 2015-312 (Effect of Divorce or Annulment)- continued

governing instrument revoked solely by divorce or annulment under this Act is revived by the divorced individual's remarriage to his or her former spouse or by the nullification of the divorce or annulment.

- In the case of a revoked nomination in a fiduciary or representative capacity, provisions of a governing instrument, such as a trust, are given effect as if the former spouse or relatives of the former spouse died immediately before the divorce or annulment.
- **The issues created by this Act should be addressed on the front end in the COT to be recorded.**

Mobile Homes

Don't insure mobile homes unless you follow all guidelines in our Alabama Agent's On Line Underwriting Practices Manual. Contact Alabama Underwriting Counsel for prior approval and guidance if you do not routinely insure manufactured homes.

One of the first and most important things to confirm is who has the Certificate of Title or Certificate of Origin and whether or not it has been properly Cancelled.

Contact us if you have ANY questions, because there is no easy way to cure these claims without hiring an attorney.

Ad Valorem Taxes and Tax Sales

Ad valorem property taxes are due and payable on October 1 of each year and become delinquent on January 1. Ala. Code § 40-11-4 (1975). Real property is advertised for tax sale in April, and tax sale is held in May. In Alabama, ad valorem taxes are paid in the arrears for the year ending on September 30.

There is no limitation on enforcement of real estate tax liens in Alabama

Insuring title derived through tax sales and tax deeds is considered to be an extra-hazardous risk in Alabama. The Company will not typically insure such titles without either recordation of a quitclaim deed from the party who owned the property at the time of the tax sale, or a successful quiet title action that quiets title in the tax sale purchaser or his successors in interest. If the tax sale purchaser and his or her successors in interest have been in actual, open, continuous, and exclusive adverse possession of the property by prescription (for 20 or more years), we will consider insuring the title derived through a tax deed upon recordation of affidavits of adverse possession by prescription from interested and disinterested parties. Contact Alabama Underwriting Counsel for approval prior to insuring title derived through tax sales and tax deeds.



Adverse Possession

In Alabama, there are two recognized forms of adverse possession – **statutory adverse possession** and **adverse possession by prescription**. Statutory adverse possession requires that possession be actual, exclusive, notorious, open and hostile, under a claim of right for a statutory period of ten years and holding under color of title, that taxes have been paid for ten years, or that title be derived by descent, descent cast, or devise from one in possession. Ala. Code § 6-5-200 (1975). Alabama Code § 6-5-200(a) (1975) requires that any color of title being relied on must be recorded. Adverse possession by prescription requires actual, exclusive, open, notorious and hostile possession under a claim of right **for a period of twenty years**. Additionally, in Alabama, adverse possession by prescription acts as an absolute rule of repose, because the passage of twenty years acts as an absolute bar to unasserted claims.

Adverse Possession- continued

As set forth above, exclusivity is one element of adverse possession. **Exclusivity often presents an obstacle to one co-tenant setting up adverse possession against another.** Because each co-tenant is entitled to possession concurrently with the other co-tenant(s) and because possession by one co-tenant is deemed to be the possession by all, special rules apply when one co-tenant seeks to set up adverse possession against another co-tenant(s). Ordinarily, there must be an "ouster" by the co-tenant claiming adverse possession. See, [Van Meter v. Grice, 380 So.2d 274 \(Ala. 1980\).](#)

In Alabama, generally, ORT is unwilling to insure title derived through adverse possession without a judicial action to establish or recognize title, such as the prosecution of an action to quiet title. However, lands may be insurable based upon adverse possession by prescription and the twenty year rule of repose on a case by case basis. . We typically require satisfactory documentation to be recorded to establish of record the requisite nature and length of possession. Prior approval from Underwriting Counsel is required on each case.

Extra-Hazardous or Unusual Risks

The following are some examples of unusual title matters which should be submitted to your supervisory office for review and determination of insurability before issuing a commitment:

- Title through:
 - tax deed;
 - sheriff's deed under an execution sale;
 - federal marshal's deed under an execution sale;
 - sale by Commissioner of Internal Revenue for unpaid federal taxes; or
 - sale following a drug forfeiture.

Title to land now under or formerly under navigable waters (filled-in land).

Title to air space or transferable development rights.

Title by adverse possession.

Title acquired through eminent domain/condemnation.

Title to severed mineral or oil and gas interest.



Extra-Hazardous or Unusual Risks- continued

Insurance of options to purchase.

Titles in or through or in trust for individual Indians or tribes, or reservation lands, or tribal property.

Present or threatened title litigation.

Transactions refused by other insurers.

Title through railroads.

Title or easements from the U.S. other than through a patent.

Requests to insure against "creditors' rights" claims.

Requests to insure against "mechanics' lien" claims, particularly when:

- a. new construction or repair work has already started (priority is lost);
- b. work has recently been completed and the time for filing liens has not expired; and/or
- c. you are asked to rely on indemnities to insure over existing or unfiled liens ("credit underwriting").

Red Flags to Look For

Underwriting Red Flags

- Proposed insured is seeking a policy not in connection with a real estate transaction.
- Another underwriter has declined to insure the subject property.
- Borrower or other interested party, brings a release or subordination agreement to the closing attorney.
- Property is not encumbered by a mortgage (did owner inherit the property?).
- Mortgage canceled with no evidence of source of funds to pay off the Mortgage (i.e., no sale or new loan).

Forgery Red Flags

- Parties are not able to appear at closing to sign documents.
- If you let the document out of your sight, you don't know what is happening with it.
- Most forgeries are mailed out or taken out of the office.
- Mortgage cancellations that appear by themselves in the chain of title.



Red Flags to Look For- continued

Mortgage Fraud Red Flags

- Closing Disclosure must be truthful.
- Be aware of inflated appraisals and other misrepresentations.

Escrow Red Flags

- Hackers can get into your email account as well as the seller, realtor, mortgage holder, lien holder, etc.
- Be on the look out for emails that:
 - Change wiring instructions that were previously received
 - Arrive outside usual business hours
 - Arrive at the last minute
 - Change often
 - Contain poor grammar and/or typos
 - Come from someone other than the parties with whom you have been working
- Emails can closely resemble original emailer. Watch out for johndoe@sendmoneyhere.com vs. johndoe@sendnoneyhere.com

THANK YOU

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