COMMON UNDERWRITING ISSUES FROM A NATIONAL PERSPECTIVE

By: **Jeffrey M. Lang**
Vice President and Corporate Underwriting Counsel
Old Republic National Title Insurance Company
Minneapolis, Minnesota

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Junior Liens of the United States – Foreclosure and Redemption

The United States as a junior lienholder has various rights under federal and state law in cases where a private or other senior interest is being foreclosed. The nature of those rights depends on whether the junior federal interest is an IRS lien, lien of the FDIC, or miscellaneous lien such as an SBA or Criminal Restitution lien. This paper will provide a short summary of each.

IRS Lien

The United States as a junior lienholder under the Internal Revenue Code, including federal tax liens or other IRS-placed liens, has the following foreclosure and redemption rights pursuant to 26 USC §7425:

> If the United States is not made a party to any action, including a foreclosure and judicial sale, then the sale shall me made subject to the lien of the United States. If the United States did not have a recorded lien at the time a judicial action commences (i.e., its lien was recorded only after the commencement of an action), then the United States' lien is treated as a subordinate matter and discharged or divested according to local law. No notice to the United States is necessary in this situation.
>
> In the case of a non-judicial sale, if the IRS notice of tax lien was filed more than 30 days prior to the sale, then the United States must be given notice of the sale not less than 25 days prior to the sale. If notice is proper, the lien will be discharged by the sale. If the IRS notice of tax lien was not filed more than 30 days prior to the sale, no notice need be given and the lien will be discharged by the sale.
>
> Following a judicial or non-judicial sale, the United States may redeem at any time within 120 days from the date of sale or the period allowable for redemption under state law, whichever is longer.

Actual Knowledge of Unrecorded Federal Tax Liens

Actual knowledge of an unrecorded federal tax lien does not affect the priority of a purchaser, holder of a security interest, mechanic's lienor, or judgment creditor. §6323 (a), of the federal tax statutes a purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, is protected against a statutory federal tax lien for which a notice of federal tax lien has not been filed, notwithstanding actual knowledge of the statutory tax lien. See, 26 U.S.C., §6323.

26 U.S.C., §6321 creates what is commonly referred to as the "general federal tax lien:" "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person."

The *creation* of a tax *lien* does *not* require a filing of public notice, and, once created, the tax lien is effective as against the taxpayer until "the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. §6322.

However, under §6323, federal tax liens that have attached to property of the taxpayer are not valid as against subsequent transferees of the property if (1) the transferee is a subsequent purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor as defined in 26 U.S.C. §6323, *and* (2) the notice of the lien was not filed "in such a manner that a reasonable inspection of the index will reveal the existence of the lien." 26 U.S.C. §6323 (f)(4).

But, what about actual knowledge of a general federal tax lien? The Third and Ninth Circuit Courts of Appeal have held that actual knowledge of a general tax lien does not disturb the protection provided by 26 U.S.C. §6323.

This issue was first raised in United States v. Beaver Run Coal Company, 99 F.2d 610 (3d Cir. 1938). Mortgagee, whose mortgage was duly recorded, had actual knowledge of a general tax lien against taxpayer-mortgagor prior to entering into the mortgage. The court rejected the government's argument that the equitable doctrine of bona fide purchasers without notice should apply with respect to priorities. The court held that the mortgagee had priority over the tax lien, where the tax lien had not been filed pursuant to state law until after the mortgage had been recorded, notwithstanding the fact that the mortgagee had actual knowledge of the tax lien when the mortgage was executed.

In TKB International, Inc., v. United States, 995 F.2d 1460 (9th Cir. 1993), Taxpayer transferred title to the property, subject to a mortgage. After that deed had been duly recorded, various notices of federal tax liens against Taxpayer were recorded. Later, TKB, who had been interested in acquiring the property, obtained a preliminary title report, which disclosed the existence of the tax liens. That transaction was not consummated. Later the mortgage was foreclosed. The IRS was not given the §7425 notice of the foreclosure sale. TKB purchased the property at the sale, which was thereafter seized by the IRS. In a lawsuit against the government, the court held in favor of TKB, saying "under the statutory framework whether TKB had actual notice of the lien is unimportant." *TKB* at 1465. The court found that TKB (1) was a subsequent "purchaser" as defined in § 6323 and (2) the notice of the lien was not filed "in such a manner that a reasonable inspection of the index will reveal the existence of the lien." TKB at 1465. Further, the lack of notice to the IRS of the foreclosure sale "neither strengthened nor weakened the IRS's claim. The lack of the notice didn't add anything to the lien if it's not good to begin with." TKB at 1465 (footnote 3).

IRS Revenue Ruling 2003-108 relies on both cases cited above, and notes further that Congress had had the opportunity (in the Federal Tax Lien Act of 1966, and thereafter for that matter) to overrule the *Beaver Run* case by limiting the protections of §6323(a) to parties without actual knowledge, but chose not to do so. Note that Congress has made actual notice or knowledge of the existence of a statutory tax lien relevant for certain "super-priority" provisions (see 26 U.S.C. §6323 (b)).

FDIC Interests

12 USC §1825(b)(2) provides that no property of the FDIC shall be subject to levy, attachment, garnishment, foreclosure or other sale without the consent of the corporation. That section applies to all property held by the FDIC either as receiver of a financial institution or in its separate corporate capacity (by virtue of 12 USC §1823(d)(3)(A)) and "property" includes both security and equity interests in real estate. Broadly interpreted, therefore, the consent of the FDIC is necessary before its lien or equity interest in the property that is being foreclosed can be extinguished.

Any title commitment, trustee's sale guarantee, or litigation guarantee issued for the purposes of a foreclosure where the FDIC has either an equity interest or a lien interest either as receiver of a financial institution or in its corporate capacity, must contain the following requirement:

> Pursuant to 12 USC §1825(b)(2), prior to any foreclosure, consent must be given by the Federal Deposit Insurance Corporation if it has a security or equity interest in the property to be foreclosed as receiver of [name of financial institution) or in its corporate capacity.

The FDIC as a junior lienholder, according to its own rules, has redemption rights as provided by state law not pursuant to a specific federal statute or regulation.

Miscellaneous Federal Interests

Judicial Foreclosures

Examples of such liens include mortgages held by the Small Business Administration (SBA), Farmers Home Administration (FHA), criminal restitution liens under 18 USC §3556, federal civil judgments and various other federal liens other than those addressed above under the IRS and FDIC sections.

For these types of interests, the United States has the following foreclosure and redemption rights pursuant to 28 USC §2410:

> The United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter to foreclose a mortgage or other lien upon (or quiet title to, or partition or condemn) any real or personal property on which the United States has or claims a mortgage or other lien.

An action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. It is Old Republic's underwriting position that a non-judicial foreclosure, by power of sale or otherwise, is not effective to eliminate the interest of the United States as a junior lienholder.

The United States shall have one year from the date of the sale within which to redeem its interest.

Non-judicial Foreclosures

The question is whether or not a junior federal interest, other than an IRS lien, can be extinguished by a non-judicial foreclosure sale (e.g., in Minnesota by advertisement pursuant to a power of sale). This risk is often overlooked by a title insurer, is not well appreciated and a policy claim is inevitable. An insurer would be affected if it were to acquire the junior interest federal lien in administering a claim or if it were to insure a purchaser after a non-judicial foreclosure without an exception for any unreleased junior federal interest. The outcome is not predictable.

For at least twenty five years ORT's underwriting position has been that 28 USC §2410, which allows a person to name the United States as a party in a foreclosure action, is the exclusive federal statute regulating private foreclosures where a junior federal interest exists. Admittedly ORT's position is not shared by other underwriters which may therefore put us at a competitive disadvantage. No federal statute specifically authorizes a private party to extinguish an SBA junior mortgage or interest by using a non-judicial state law procedure. Unlike it did for IRS liens and FDIC interests, Congress has not specifically approved a non-judicial process for extinguishing SBA or other non-specified governmental junior liens or mortgages.

Cases construing these issues are unfortunately easily distinguishable. Two cases are commonly cited to support the positions that a judicial foreclosure is not an exclusive remedy or that state non-judicial foreclosure procedures are adopted as federal law: the 1960 U.S. Supreme Court Brosnan case of *United States v. Bronson*, 363 U.S. 237 (1960) involved junior federal tax liens and the 1988 9th Circuit Court of Appeals case of *Dupnik v. U.S.*, 848 F2d 1476 (9th Cir. 1988) involved a junior SBA mortgage.

Brosnan involved two federal tax liens, not junior mortgages. One was extinguished non-judicially in California under a power of sale. The other was extinguished in a Pennsylvania action in the nature of a writ of execution. Actual notice to junior creditors was not required by either state and none was received by the U.S. The foreclosing parties unsuccessfully attempted to "quiet title" under §2410, but a §2410 analysis was not determinative of the outcome in either state. However, the then current version was discussed at length, the issues being whether the federal liens were effectively extinguished by the state proceedings or not because Congress had intended to exclude state procedures.

The *Brosnan* majority interpreted §2410 to be a waiver of sovereign immunity. Without a waiver or other congressional authorization, the U.S. can not be sued. The Court said that no inference can be drawn that Congress intended to exclude other state law procedures such as non-judicial foreclosures. It adopted state law as federal common law "in cases such as these." It refused to displace well-established state procedures or superimpose on them a new, federal rule or to hold that the doctrine of sovereign immunity applied to private sales because they must somehow amount to a "suit." It interpreted congressional "silence" as an invitation to create a federal common law. Congress could, however, determine otherwise. The court construed the Pennsylvania action to be a "judicial action" that extinguished the tax lien. Under the then current §2410, the Pennsylvania procedure therefore extinguished junior liens even though the U.S. was not required to be a party.

The minority disagreed. It argued that receiving notice was the key to Congress's intent. Without notice, the statute's one year right of redemption is meaningless. It was essential to protecting the government's interest because Congress needed time to appropriate funds with which to redeem. It noted that not all state non-judicial foreclosure schemes provide for notice to the U.S. and that the uncertainty of receiving notice and disparity of results were reasons not to adopt state law as federal common law.

Six years later, in 1966, Congress added the following sentence to Subp. (c): However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. In addition, Subp. (a) was changed to state the outcome of an action where the U.S. is not made a party: i.e., "no notice = no extinguishment." The former version said the U.S. "may" be named a party without reciting any consequence for failure to do so. Congress made the changes in response to the *Brosnan* minority's opinion, according to commentators. (See e.g., *United States v. Capobianco*, 836 F2d 808 (3d Cir. 1988) and *Dupnik*) Nothing in the changes or the legislative history stated an intent to adopt state law procedures as federal law or to prohibit non-judicial procedures. At the same time, Congress enacted §7425 of the Internal Revenue Code (26 USC §7425), which expressly provides for notice and redemption in cases of non-judicial foreclosures involving junior federal tax liens. The underlined clause may be read literally, or the enactment of §7425 may imply that Congress agreed that only it could authorize (or prohibit) any non-judicial foreclosure where the U.S. has a junior lien. The meaning of "judicial sale" in the amended version of §2410 was construed by the *Capobianco* court to mean plenary actions on the merits where the U.S. is joined as a party, as opposed to an action and sale held pursuant to, say, a writ of execution.

Dupnik involved an Arizona judicial foreclosure of a junior SBA interest twelve years after the 1966 changes to 2410. The *Dupnik* court adopted as federal law an Arizona statute that required junior lienors to record a notice of intent to redeem within six months of the foreclosure sale or lose their right to redeem. The Court determined that 2410 did not evince a clear congressional attempt to override (i.e., to preempt) the state requirement or "to have uniform federal rules govern federal liens" even though the Court in footnote 4 acknowledged the 1966 change to §2410: "Shortly after the *Brosnan* decision was announced, Congress amended §2410 to require a judicial sale so that the government would be notified about the foreclosure." *Dupnik* and *Capobianco* were both decided in the same year - 1988.

Dupnik was rejected by the 10th Circuit Court of Appeals in *Title Insurance Company of Minnesota v. I.R.S.*, 963 F.2D 297 (10th Cir. 1992) which held that federal law preempts a Colorado law that required junior lienors to file a notice of intent to redeem within 75 days of the sale, at least insofar as federal tax lien law is concerned. Even though the U.S. received actual notice of the private Colorado non-judicial foreclosure sale as required by §7425, the U.S. successfully argued that the Colorado requirement deprived it of its right to redeem within 120 days under that section. The case did not address whether or not a judicial sale is the exclusive remedy, however, the court plainly stated that its holding is “not in accord with *Dupnik*” and that it is "simply not persuaded by *Dupnik*.” Any contestant would now argue that the 10th Circuit rejected *Dupnik* in its entirety. At the least, two Circuits are split as to preemption.

The Supreme Court in 2009 denied certiorari to the 10th Circuit in *Russell v. United States*, 551 F3d 1174 (10th Cir. 2008) the case in which First American sought amicus support from the industry to challenge the circuit's denial of use of a Colorado curative action to extinguish junior federal tax liens where the U.S. did not receive notice of a non-judicial foreclosure sale as required by §7425. The challenge argued that Brosnan is dispositive of the issue that state law is adopted as federal law in a non-judicial foreclosure.

In 2000, HUD argued in a California federal district court case that the Supremacy and Property Clauses of the Constitution preclude a private party from using a non-judicial foreclosure to sell property acquired by HUD by foreclosure. See, *Secretary of HUD v. Sky Meadow Association*, 117 F. Supp. 2d 970 (C.D. Cal. 2000). HUD admitted it was liable for Sky Meadow Association's homeowner association dues that were senior to its interest, but brought a quiet title action after the association refused to accept its redemption tender. HUD argued that the Property Clause prevents the seizure of U.S. property without its consent (citing case law that includes mortgage interests in the definition of U.S. property) and that the purpose of the Supremacy Clause is to avoid the introduction of disparities, confusions and conflicts which would follow if the government's general authority were subject to local controls. The association countered by arguing that even though a state or local government cannot "convey absolute title in derogation of the federal interest"- a private homeowner's association can do so when it non-judicially forecloses on the federal government's interest in the property. The Court disagreed with the association, holding that in order for a state or private party to proceed in such a manner there must be express congressional approval to do so.

The *Sky Meadow* court distinguished the *Brosnan* rule that state law should be the federal rule of decision. It found that the instant case requires a uniform federal practice: "It is doubtful, here, that Congress in enacting the Single Family Mortgage Insurance Program, intended 'the outcome to depend upon varying characterizations of state law." Analytically, the focus on any specific program is important. SBA programs are just that, i.e., programs. Courts seek just such reasons to justify protecting the public coffers or other significant federal interests. Federal tax lien cases like those in *United States v. Craft*, 122 S.CT.1414 (2002) are perfect examples. This is true even though the Sky Meadow district court thought that ownership and mortgage interests should be treated differently, contradicting case law to the contrary. The statement about state law variations hearkens back to the *Brosnan* minority's concern about a disparity of results caused by varying state laws.

All of the cited cases are distinguishable in one way or another but one can not assume that the fifty year old *Brosnan* case is the last word on the issue, particularly since Congress changed two statutes in reaction to it. The preemption issue after the 1966 changes to §2410 is certain to be raised as are the Property and Supremacy clause arguments. In Minnesota, it is easy to envision an argument that Minn. Stat. § 580.032, which allows a junior lienor to record a request for notice of foreclosure, is burdensome and therefore an unlawful impediment to the government's right to redeem.

DURATION OF FEDERAL LIENS

The following are the generally applicable rules for the duration of federal liens:

Federal tax lien: 10 years from assessment date (26 USC 6502(a)); 10 year extension (26 USC 6323(g)(3)); extension by agreement (26 USC 6502(a)(2)); possible tolling of 10 year period (26 USC 6503).

Federal estate or gift tax lien: 10 years from death or gift (26 USC 6324(a) and (b)); lien by agreement (26 USC 6324A).

Employer liability (ERISA) lien: six years from termination of plan, with possible tolling of six year period (29 USC 1368(b) and (d)).

Recorded abstract of federal civil judgment: 20 years from recording, renewable for 20 years (28 USC 3201 (a)).

Recorded notice of federal criminal fine: until death of the person fined or the later of 20 years from entry or 20 years after release from prison (18 USC 3613(b)).

Federal environmental (CERCLA) lien: until satisfied or until U.S. action is time barred (42 USC 9613; 42 USC 9607).

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 the 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.

<u>CFPB's Seller Carry Back Financing Regulations</u>

On January 10, 2014, the CFPB regulations pertaining to loan originator compensation, qualification and licensing went into effect. The primary purpose of these rules is to both protect consumers by reducing incentives for loan originators to steer unwary consumers into loans with "risky features" as well as to ensure that loan originators are adequately qualified. Under the CFPB's new rules, persons classified as loan originators are required to meet qualification requirements and are also subject to certain restrictions on compensation practices.

The rule amends Regulation Z of the Truth and Lending Act by providing the following definition of "Loan Originator":

> **Loan originator.** For purposes of this section, the term "loan originator" means with respect to a particular transaction, a person who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. The term "loan originator" includes an employee of the creditor if the employee meets this definition. The term "loan originator" includes the creditor only if the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, including drawing on a bona fide warehouse line of credit, or out of deposits held by the creditor.

See, 12 C.F.R. §1026.36(a)(1)(i).

Although broad, the rule contains an important carve out for seller carry back financing transactions. These transactions, although not without their dangers to both the seller/financer and the title company, do provide a safe harbor under which the majority of these types of transactions can proceed. Under the new CFPB Rules, a seller who finances the property's purchase will not be considered to be a "loan originator" as long as the seller both complies and is able to fit in to one of two exemptions: the sale of three or fewer properties in a 12 month period, or, the sale of only one property in a 12 month period. These two exemptions are found at 12 CFR §§ 1026.36(a)(4) and (a)(5) respectively and are as follows:

Three or fewer properties in a 12 month period

<u>A person*</u> is not a loan originator if:

(i) The person provides seller financing for the sale of three or fewer properties in any 12-month period to purchasers of such properties, each of which is owned by the person and serves as security for the financing.

(ii) The person has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.

(iii) The person provides seller financing that meets the following requirements:

(A) The financing is fully amortizing.

(B) The financing is one that the person determines in good faith the consumer has a reasonable ability to repay.

(C) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.

(Emphasis added). 12 CFR § 1026.36(a)(4).

*Note: For the purposes of this provision, a "Person" is as defined in 12 CFR § 1026.2(a)(22), i.e. a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit. See, 12 CFR § 1026.36(a)(4).

The sale of only one property in a 12 month period

A natural person, estate, or trust is not a loan originator if:

(i) The natural person, estate, or trust provides seller financing for the sale of only one property in any 12-month period to purchasers of such property, which is owned by the natural person, estate, or trust and serves as security for the financing.

(ii) The natural person, estate, or trust has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.

(iii) The natural person, estate, or trust provides seller financing that meets the following requirements:

(A) The financing has a repayment schedule that does not result in negative amortization.

(B) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.

(Emphasis added). 12 CFR § 1026.36(a)(5).

It is important to note that this more flexible one property exemption, applies to a much narrower and more specific definition of "Person", i.e. only natural persons, estates and trusts. This provision is not applicable to other types of organizations such as corporations, partnerships, limited liability companies, or proprietorships.

These exemptions only apply to situations where the property being purchased is improved with a one to four family residence and is one in which the buyer intends to use as their primary residence. Situations such as the purchase of a vacant lot on which the buyers are going to build their primary residence or where the private financer doesn't own the property being sold, or where the property either commercial in nature or improved by something other than a one to four family residence, do not qualify for this exemption.

Title Risks Imposed by Insuring Seller Carry Back Transactions

Policy Liability

As previously stated, the CFPB's definition of "Loan Originator" specifically excludes two categories of seller financed transactions: a) the financing for the sale of three or fewer properties in a 12 month period by any person or entity and b) the financing for the sale of one property in a 12 month period by natural persons, estates or trusts.

In the event the seller financer fails to qualify for one of these exception categories, the Courts and the CFPB can take whatever legal or equitable remedy they deem appropriate including rescission or reformation of the contract as well as a return of the real property. (See, 12 U.S.C. § 5565).

Additionally, 12 USC § 5536(a) specifically makes it "unlawful" for any covered person or service provider to:

(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or

(B) to engage in any unfair, deceptive, or abusive act or practice.

See, 12 USC § 5536(a)(1).

Given the broad remedial powers of the CFPB, insuring such transactions can be problematical. As a title company, we may never know that seller financer has fully complied with the seller carry back requirements or may have sold more properties in a 12 month period than allowed. Consequently, any seller carry back financing transaction that is insured is potentially subject to being challenged as being "unlawful" and therefore unenforceable if the seller financer fails to fully comply with the statutory exclusions.

Nevertheless, if the originating seller financer is our Insured, we will have the Exclusion from Coverage Section 3(a) and 3(b) policy defenses to this type of claim as it would be a matter suffered, assumed or agreed to by the Insured Claimant as well as a matter not known to the Company but known to the Insured and not disclosed by the either the Public Records or in writing to the Company.

Unfortunately, we would not have the same Section 3(a) and 3(b) defenses if the loan has been assigned. As a general rule, we do not have defenses as to an assignee which we may have directly against a party who by act or omission creates its own loss. Most seller-financers, however, do not sell the loan so from a title standpoint, this risk appears to be fairly remote.

At the present time, ALTA is considering adding a specific exclusion to its Policies but has not yet decided to do so. In the meantime, if asked to close and insure such transactions, it is advisable to include a specific provision in the standard seller/financer's affidavit attesting to the fact that the seller/financer has not done more of these transactions than allowed under the regulations and that the transaction itself is in compliance with all applicable exemption requirements. It is also advisable to include a specific provision in the typical Buyer's Affidavit attesting to the fact that the buyer intends to occupy and use the property as their primary residence.

Closing Liability

Absent actual knowledge of the seller's inability to qualify for one of the two seller carry back financing exemptions, or an active involvement in the negotiation of the terms of the financing, the act of preparing the documents that may be used in connection with such a transaction such as the drafting the note and the mortgage or deed of trust, would not make the closer a "loan originator".

As previously stated, the definition of "loan originator" includes anyone who performs any activities related to the origination of mortgage loans in exchange for compensation.

Those who perform purely administrative or clerical tasks on a behalf of a person or an entity who is considered a loan originator, however, are specifically excluded from the definition. (See, 12 CFR §1026.36(a)(1)(A)).

Consequently, even if the escrow person in question performs work for an entity that would otherwise fall within the definition of "loan originator", the clerical or administrative nature of simply drafting the Note and/or Deed of Trust would only create an issue, if that person was also negotiating the specific terms of the sale and financing. This conclusion is buttressed by the CFPB's own 2013 Loan Originator Rule Small Entity Compliance Guide ("CFPB Compliance Guide") states that someone will not be considered a Loan Originator simply because they:

> Perform loan-processing activities, such as compiling and assembling credit application packages and **supporting documentation, for a loan originator or creditor**. (Emphasis added).

(CFPB 2013 Loan Originator Rule Small Entity Compliance Guide, Page 18).

The CFPB Compliance Guide also provides the following specific example:

> For example, assume you are a loan originator organization that provides title insurance to a consumer in a transaction. Because providing title insurance is not a loan origination activity, the payment to you for the title insurance is not compensation, so long as your insurance charge was bona fide and reasonable.

See, CFPB 2013 Loan Originator Rule Small Entity Compliance Guide, Page 24.

To obtain a complete copy of the CFPB Compliance Guide, use the following link:

> http://files.consumerfinance.gov/f/201306_cfpb_compliance-guide_loan-originator-compensation-rule.pdf

Based on the definitions as well as the CFPB Compliance Guide, it is seems therefore clear that, absent a more active involvement in the overall transaction, the CFPB does not consider the mere preparation of the loan documentation to fall within the definition of a "loan originator" activity. Nevertheless, it is worth noting that the administrative carve outs may change if the compensation paid to the title company is dependent upon the interest rate being charged or some other term of either the specific transaction or multiple transactions. See, 12 CFR § 1026.36 (b)(1).

Although the simple administrative act of preparing the loan documents may not turn the closer into a "loan originator", depending on the jurisdiction in which the closer is located, such an activity may nonetheless constitute the unauthorized practice of law. Additionally, if a typographical mistake in the documentation is made, the closer as well as the closer's employer may also be subject to a claim of negligence and/or breach of contract. Care should always be taken when asked to prepare transactional documents.

Conclusion

Care should always be taken when trying to interpret and apply any new statute or regulation and those involving the CFPB are no exception. Given the breadth and extent of the regulations and the CFPB's enforcement powers, a conservative and cautious approach is highly recommended.

TEXT OF LOSS SELLER CARRY BACK FINANCING RULES

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons stated in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

AUTHORITY: 12 U.S.C. 2601; 2603-2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

2. Section 1026.25 is amended by adding paragraph (c)(2) to read as follows: § 1026.25 Record Retention.

(c) * * *

(2) *Records related to requirements for loan originator compensation.* Notwithstanding paragraph (a) of this section, for transactions subject to § 1026.36 of this part:

(i) A creditor shall maintain records sufficient to evidence all compensation it pays to a loan originator, as defined in § 1026.36(a)(1), and the compensation agreement that governs those payments for three years after the date of payment.

(ii) A loan originator organization, as defined in § 1026.36(a)(1)(iii), shall maintain records sufficient to evidence all compensation it receives from a creditor, a consumer, or another person; all compensation it pays to any individual loan originator, as defined in § 1026.36(a)(1)(ii); and the compensation agreement that governs each such receipt or payment, for three years after the date of each such receipt or payment.

3. Section 1026.36 is amended by:

A. Revising the section heading, the heading of paragraph (a), and paragraph (a)(1);

B. Adding paragraphs (a)(3), (a)(4), (a)(5), and (b);

C. Revising paragraphs (d)(1), (d)(2), (e)(3)(i)(C), and (f); and

D. Adding paragraphs (g) through (j). The

additions and revisions read as follows:

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

(a) *Definitions. (1) Loan originator.* (i) For purposes of this section, the term "loan originator" means a person who, in expectation of direct or indirect compensation or other monetary gain or for direct or indirect compensation or other monetary gain, performs any of the following activities: takes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities. The term "loan originator" includes an employee, agent, or contractor of the creditor or loan originator organization if the employee, agent, or contractor meets this definition. The term "loan originator" includes a creditor that engages in loan origination activities if the creditor does not finance the transaction at consummation out of the creditor's own resources, including by drawing on a *bona fide* warehouse line of credit or out of deposits held by the creditor. All creditors that engage in any of the foregoing loan origination activities are loan originators for purposes of § 1026.36(f) and (g). The term does not include:

(A) A person who does not take a consumer credit application or offer or negotiate credit terms available from a creditor, but who performs purely administrative or clerical tasks on behalf of a person who does engage in such activities.

(B) An employee of a manufactured home retailer who does not take a consumer credit application, offer or negotiate credit terms available from a creditor, or advise a consumer on credit terms (including rates, fees, and other costs) available from a creditor.

(C) A person that performs only real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person is compensated by a creditor or loan originator or by any agent of such creditor or loan originator for a particular consumer credit transaction subject to this section.

(D) A seller finances that meets the criteria in paragraph (a)(4) or (a)(5) of this section, as applicable.

(E) A servicer or servicer's employees, agents, and contractors who offer or negotiate terms for purposes of renegotiating, modifying, replacing, or subordinating principal of existing mortgages where consumers are behind in their payments, in default, or have a reasonable likelihood of defaulting or falling behind. This exception does not apply, however, to a servicer or servicer's employees, agents, and contractors who offer or negotiate a transaction that constitutes a refinancing under § 1026.20(a) or obligates a different consumer on the existing debt.

(ii) An "individual loan originator" is a natural person who meets the definition of "loan originator" in paragraph (a)(1)(i) of this section.

(iii) A "loan originator organization" is any loan originator, as defined in paragraph (a)(1)(i) of this section, that is not an individual loan originator.

(3) *Compensation.* The term "compensation" includes salaries, commissions, and any financial or similar incentive.

(4) *Seller fmancers: three properties.* A person (as defined in § 1026.2(a)(22)) that meets all of the following criteria is not a loan originator under paragraph (a)(1) of this section:

(i) The person provides seller financing for the sale of three or fewer properties in any 12-month period to purchasers of such properties, each of which is owned by the person and serves as security for the financing.

(ii) The person has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.

(iii)The person provides seller financing that meets the following requirements:

(A) The financing is fully amortizing.

(B) The financing is one that the person determines in good faith the consumer has a reasonable ability to repay.

(C) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.

(5) Seller financer.5, one property. A natural person, estate, or trust that meets all of the following criteria is not a loan originator under paragraph (a)(1) of this section:

(i) The natural person, estate, or trust provides seller financing for the sale of only one property in any 12-month period to purchasers of such property, which is owned by the natural person, estate, or trust and serves as security for the financing.

(ii) The natural person, estate, or trust has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.

(iii) The natural person, estate, or trust provides seller financing that meets the following requirements:

(A) The financing has a repayment schedule that does not result in negative amortization.

(B) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.

(b) *Scope.* Paragraph (c) of this section applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. Paragraphs (d), (e), (f), (g), (h), and (i) of this section apply to closed-end consumer credit transactions secured by a dwelling. This section does not apply to a home equity line of credit subject to § 1026.40, except that paragraphs (h) and (i) of this section apply to such credit when secured by the consumer's principal dwelling. Paragraphs (d), (e), (f), (g), (h), and (i) of this section do not apply to a loan that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D).

(d)* * *

(1) Payments based on a term of a transaction. (i) Except as provided in paragraph (d)(1)(iii) or (iv), of this section, in connection with a consumer credit transaction secured by a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on a term of a transaction, the terms of multiple transactions by an individual loan originator, or the terms of multiple transactions by multiple individual loan originators. If a loan originator's compensation is based in whole or in part on a factor that is a proxy for a term of a transaction, the loan originator's compensation is based on a term of a transaction. A factor that is not itself a term of a transaction is a proxy for a term of the transaction if the factor consistently varies with that term over a significant number of transactions, and the loan originator has the ability, directly or indirectly, to add, drop, or change the factor in originating the transaction.

(ii) For purposes of this paragraph (d)(1) only, a "term of a transaction" is any right or obligation of the parties to a credit transaction. The amount of credit extended is not a term of a transaction or a proxy for a term of a transaction, provided that compensation received by or paid to a loan originator, directly or indirectly, is based on a fixed percentage of the amount of credit extended; however, such compensation may be subject to a minimum or maximum dollar amount.

(iii) An individual loan originator may receive, and a person may pay to an individual loan originator, compensation in the form of a contribution to a defined contribution plan that is a designated tax-advantaged plan or a benefit under a defined benefit plan that is a designated tax-advantaged plan. In the case of a contribution to a defined contribution plan, the contribution shall not be directly or indirectly based on the terms of that individual loan originator's transactions. As used in this paragraph (d)(1)(iii), "designated tax-advantaged plan" means any plan that meets the requirements of Internal Revenue Code section 401(a), 26 U.S.C. 401(a); employee annuity plan described in Internal Revenue Code section 403(a), 26 U.S.C. 403(a); simple retirement account, as defined in Internal Revenue Code section 408(p), 26 U.S.C. 408(p); simplified employee pension described in Internal Revenue Code section 408(k), 26 U.S.C. 408(k); annuity contract described in Internal Revenue Code section 403(b), 26 U.S.C. 403(b); or eligible deferred compensation plan, as defined in Internal Revenue Code section 457(b), 26 U.S.C. 457(b).

(iv) An individual loan originator may receive, and a person may pay to an individual loan originator, compensation under a non-deferred profits-based compensation plan *(i.e.*, any arrangement for the payment of non-deferred compensation that is determined with reference to the profits of the person from mortgage-related business), provided that:

(A) The compensation paid to an individual loan originator pursuant to this paragraph (d)(l)(iv) is not directly or indirectly based on the terms of that individual loan originator's transactions that are subject to this paragraph (d); and

(B) At least one of the following conditions is satisfied:

(1) The compensation paid to an individual loan originator pursuant to this paragraph (d)(1)(iv) does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which the compensation under the non-deferred profits-based compensation plan is paid; or

(2) The individual loan originator was a loan originator for ten or fewer transactions subject to this paragraph (d) consummated during the 12-month period preceding the date of the compensation determination.

(2) *Payments by persons other than consumer*. *(i) Dual compensation.* (A) Except as provided in paragraph (d)(2)(i)(C) of this section, if any loan originator receives compensation directly from a consumer in a consumer credit transaction secured by a dwelling:

(1) No loan originator shall receive compensation, directly or indirectly, from any person other than the consumer in connection with the transaction; and

(2) No person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) shall pay any compensation to a loan originator, directly or indirectly, in connection with the transaction.

(B) Compensation received directly from a consumer includes payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates, under which such other person agrees to provide funds toward the consumer's costs of the transaction (including loan originator compensation).

(C) If a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator organization may pay compensation to an individual loan originator, and the individual loan originator may receive compensation from the loan originator organization, subject to paragraph (d)(1) of this section.

(ii) *Exemption.* A payment to a loan originator that is otherwise prohibited by section 129B(c)(2)(A) of the Truth in Lending Act is nevertheless permitted pursuant to section 129B(c)(2)(B) of the Act, regardless of whether the consumer makes any upfront payment of discount points, origination points, or fees, as described in section 129B(c)(2)(B)(ii) of the Act, as long as the loan originator does not receive any compensation directly from the consumer as described in section 129B(c)(2)(B)(i) of the Act.

(e) * * *

(3) * * *
(i) * * *

(C) The loan with the lowest total dollar amount of discount points, origination points or origination fees (or, if two or more loans have the same total dollar amount of discount points, origination points or origination fees, the loan with the lowest interest rate that has the lowest total dollar amount of discount points, origination points or origination fees).

(f) *Loan originator qualification requirements.* A loan originator for a consumer credit transaction secured by a dwelling must, when required by applicable State or Federal law, be registered and licensed in accordance with those laws, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act, 12 U.S.C. 5102 *et seq.),* its implementing regulations (12 CFR part 1007 or part 1008), and State SAFE Act implementing law. To comply with this paragraph (f), a loan originator organization that is not a government agency or State housing finance agency must:

(1) Comply with all applicable State law requirements for legal existence and foreign qualification;

(2) Ensure that each individual loan originator who works for the loan originator organization is licensed or registered to the extent the individual is required to be licensed or registered under the SAFE Act, its implementing regulations, and State SAFE Act implementing law before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling; and

(3) For each of its individual loan originator employees who is not required to be licensed and is not licensed as a loan originator pursuant to § 1008.103 of this chapter or State SAFE Act implementing law:

(i) Obtain for any individual whom the loan originator organization hired on or after January 10, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 10, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under § 1026.36(f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling:

(A) A criminal background check through the Nationwide Mortgage Licensing System and Registry (NMLSR) or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, a criminal background check from a law enforcement agency or commercial service;

(B) A credit report from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act (15 U.S.C. 1681a(p)) secured, where applicable, in compliance with the requirements of section 604(b) of the Fair Credit Reporting Act, 15 U.S.C. 1681b(b); and

(C) Information from the NMLSR about any administrative, civil, or criminal findings by any government jurisdiction or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, such information from the individual loan originator;

(ii) Determine on the basis of the information obtained pursuant to paragraph (f)(3)(i) of this section and any other information reasonably available to the loan originator organization, for any individual whom the loan originator organization hired on or after January 10, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 10, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under this § 1026.36(f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling, that the individual loan originator:

(A)(1) Has not been convicted of, or pleaded guilty or *nolo contendere* to, a felony in a domestic or military court during the preceding seven-year period or, in the case of a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering, at any time;

(2) For purposes of this paragraph (f)(3)(ii)(A):

(i) A crime is a felony only if at the time of conviction it was classified as a felony under the law of the jurisdiction under which the individual was convicted;

(ii) Expunged convictions and pardoned convictions do not render an individual unqualified; and

(iii) A conviction or plea of guilty or *nolo contendere* does not render an individual unqualified under this § 1026.36(f) if the loan originator organization has obtained consent to employ the individual from the Federal Deposit Insurance Corporation (or the Board of Governors of the Federal Reserve System, as applicable) pursuant to section 19 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1829, the National Credit Union Administration pursuant to section 205 of the Federal Credit Union Act (FCUA), 12 U.S.C. 1785(d), or the Farm Credit Administration pursuant to section 5.65(d) of the Farm Credit Act of 1971 (FCA), 12

USC 227a-14(d), notwithstanding the bars posed with respect to that conviction or plea by the FDIA, FCUA, and FCA, as applicable; and

(B) Has demonstrated financial responsibility, character, and general fitness such as to warrant a determination that the individual loan originator will operate honestly, fairly, and efficiently; and

(iii) Provide periodic training covering Federal and State law requirements that apply to the individual loan originator's loan origination activities.

(g) *Name and NMLSR ID on loan documents.* (1) For a consumer credit transaction secured by a dwelling, a loan originator organization must include on the loan documents described in paragraph (g)(2) of this section, whenever each such loan document is provided to a consumer or presented to a consumer for signature, as applicable:

(i) Its name and NMLSR ID, if the NMLSR has provided it an NMLSR ID; and

(ii) The name of the individual loan originator (as the name appears in the NMLSR) with primary responsibility for the origination and, if the NMLSR has provided such person an NMLSR ID, that NMLSR ID.

(2) The loan documents that must include the names and NMLSR IDs pursuant to paragraph (g)(1) of this section are:

(i) The credit application;

(ii) [Reserved]

(iii) The note or loan contract; and

(iv) The security instrument.

(3) For purposes of this section, NMLSR ID means a number assigned by the Nationwide Mortgage Licensing System and Registry to facilitate electronic tracking and uniform

identification of loan originators and public access to the employment history of, and the publicly adjudicated disciplinary and enforcement actions against, loan originators.

(h) Prohibition on mandatory arbitration clauses and waivers of certain consumer rights. (1) Arbitration. A contract or other agreement for a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction. This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute or claim under the transaction arises, to settle or use arbitration or other non-judicial procedure to resolve that dispute or claim.

(2) *No waivers of Federal statutory causes of action.* A contract or other agreement relating to a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not be applied or interpreted to bar a consumer from bringing a claim in court pursuant to any provision of law for damages or other relief in connection with any alleged violation of any Federal law. This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute or claim under the transaction arises, to settle or use arbitration or other non-judicial procedure to resolve that dispute or claim.

(i) Prohibition on financing single premium credit insurance. (1) A creditor may not finance, directly or indirectly, any premiums or fees for credit insurance in connection with a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling). This prohibition does not apply to credit insurance for which premiums or fees are calculated and paid in full on a monthly basis.

(2) For purposes of this paragraph (i), "credit insurance":

(i) Means credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, but

(ii) Excludes credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to a separate insurance contract and are not paid to an affiliate of the creditor.

(j) *Policies and procedures to ensure and monitor compliance.* (1) A depository institution must establish and maintain written policies and procedures reasonably designed to ensure and monitor the compliance of the depository institution, its employees, its subsidiaries, and its subsidiaries' employees with the requirements of paragraphs (d), (e), (f), and (g) of this section. These written policies and procedures must be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the depository institution and its subsidiaries.

(2) For purposes of this paragraph (j), "depository institution" has the meaning in section 1503(2) of the SAFE Act, 12 U.S.C. 5102(2). For purposes of this paragraph (j), "subsidiary" has the meaning in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

CFPB'S Loss Mitigation Rules

The CFPB has issued new mortgage servicing rules which will impose specific loss mitigation requirements on federally related mortgage lenders prior to the lender or its servicer initiating or completing a foreclosure action. These new procedures are specifically designed for the benefit of residential homeowners who are facing foreclosure and go into effect on January 10, 2014. The new rules amend Regulation X of RESPA and read in pertinent part as follows:

A. A servicer **shall not** make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. See, 12 CFR §1024.41(f) (emphasis added) and

B. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer **shall not** move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

See, §1024.41(g) (emphasis added).

The prohibitions contained in the new rules are each governed by the mandatory phrase "shall not". Due to the absolute nature of this phrase, it may be argued that commencing or continuing with a foreclosure in violation of the regulations makes the foreclosure itself void. Unfortunately, there is nothing in the rule which definitively states that to be the case. In this regard, it is worth noting that, unlike other statutes or regulations containing specific pre-foreclosure requirements such as the Servicemembers Civil Relief Act, **there is no time frame within which the borrower must bring an action to invalidate the foreclosure and** there is no BFP exemption. Nevertheless, until such time as the rule is amended or has been judicially analyzed, whether a non-compliant foreclosure is void or voidable is an open question.

In addition to the foreclosure being void or voidable, §1024.41(a) also provides a borrower with a private cause of action should a lender violate the loss mitigation requirements. In pertinent part, this subdivision states: "A borrower **may** enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))". (Emphasis added).

Under 12 U.S.C. 2605(f), the borrower is entitled to recover any actual damages sustained plus the fees and costs incurred in bringing the action. If it is determined that the lender has engaged in a "pattern and practice of noncompliance", the court is given the discretion to award whatever additional damages it decides are appropriate in an amount not to exceed $2000.00. The statute of limitations for bringing an action under 12 U.S.C. 2605(f) is three (3) years from the date of the violation. See, 12 U.S.C. 2614.\

Finally, the new rule also leaves open the question of whether or not junior creditors have standing to contest the foreclosure process. Again, the rule is silent on this point and the issue may be argued both ways. Consequently, the ultimate conclusion on this issue will most likely be left to the courts.

Impact

Since a foreclosure by a lender who has failed to comply with the loss mitigation procedures may be considered void as opposed to voidable, and there is no BFP exemption, coverage afforded under any post foreclosure policy will be at risk unless:

a. The policy contains an appropriate exception;
b. The agent has performed the appropriate due diligence regarding the foreclosure process;
c. In a judicial foreclosure state, the applicable appeal period has run;
d. In non-judicial states, an appropriate affidavit is recorded with the foreclosure sale documents; or
d. The agent obtains a clear and unambiguous affidavit from the foreclosing lender attesting to its compliance.

The biggest risk will occur in non-judicial foreclosure states as in judicial foreclosure states courts are likely to require specific affidavits attesting to the lenders compliance. Although it is also suspected that courts will eventually carve out protections for BFPs, as well as determine what rights, if any, junior creditors may have to contest the foreclosure, the litigation costs of having to get to that point could be substantial

TEXT OF LOSS MITIGATION RULES

§ 1024.41 Loss mitigation procedures.

(a) Enforcement and limitations. A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in section 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in section 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

(b) Receipt of a loss mitigation application. (1) Complete loss mitigation application. A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) *Review of loss mitigation application submission. (i) Requirements.* If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (2)(ii) of this section.

The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must state that the borrower should submit the documents and information necessary to make the loss mitigation application complete by the earliest remaining date of:

(A) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

(B) The date that is the 120th day of the borrower's delinquency;

(C) The date that is 90 days before a foreclosure sale; or

(D) The date that is 38 days before a foreclosure sale.

(c) *Evaluation of loss mitigation applications. (1) Complete loss mitigation application.* If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage loan.

(2) *Incomplete loss mitigation application evaluation. (i) In general.* Except as set forth in paragraph (c)(2)(ii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation option for all loss mitigation options available to the borrower by offering a loss

mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(ii) *Reasonable time.* Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.

(d) *Denial of loan modification options.* If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section:

(1) The specific reasons for the servicer's determination for each such trial or permanent loan modification option; and

(2) If applicable pursuant to paragraph (h) of this section, that the borrower may appeal the servicer's determination for any such trial or permanent loan modification option, the deadline for the borrower to make an appeal, and any requirements for making an appeal.

(e) *Borrower response. (1) In general.* Subject to paragraphs (e)(2)(ii) and (e)(2)(iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.

(2) *Rejection. (i) In general.* Except as set forth in paragraphs (e)(2)(ii) and (e)(2)(iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.

(ii) Trial Loan Modification Plan. A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.

(iii) Interaction with appeal process. If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(f) *Prohibition on foreclosure referral. (1) Pre foreclosure review period.* A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent.

(2) *Application received before foreclosure referral.* If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (0(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial

or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(ii) The borrower rejects all loss mitigation options offered by the servicer; or

(iii) The borrower fails to perform under an agreement on a loss mitigation option.

(g) *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

(h) *Appeal process. (1) Appeal process required for loan modification denials.* If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) Deadlines. A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.

(3) Independent evaluation. An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

(4) Appeal determination. Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) *Duplicative requests.* A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

(j) *Small servicer requirements.* A small servicer shall not make the first notice or filing required by applicable law for any judicial or non judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

<u>PACA and PASA Trust Liens</u>

There are two potential "hidden" liens when insuring either agricultural property or property used in connection with the food production industry. These liens may arise under either The Perishable Agricultural Commodities Act ("PACA") (7 U.S.C. §§499a, et seq.) or under The Packers and Stockyards Act ("PASA") (7 U.S.C. §§181 et seq.). It should be noted that PASA has been amended to also include poultry producers. These types of liens are "hidden" as no recorded or other public notice of either their existence or their extent is required.

These laws are designed to protect the payment streams due to the suppliers or sellers by imposing a floating, non-segregated statutory trust on all produce-related assets. See, 7 U.S.C. § 499e(c)(2); and *In re Magic Restaurants, Inc.,* 205 F.3d 108, 111 (3d Cir. 2000). Prior to the enactment of these laws, if a buyer was unable to fully pay its bills or filed bankruptcy, sellers were essentially no better off than the debtor's other unsecured creditors. Consequently, in a bankruptcy situation, sellers often received either pennies on the dollar for what was owed or potentially nothing at all. Due to concerns over the financial stability of the food producing industry, between 1984 and 1987, Congress enacted and/or amended these laws in an effort to avoid this perceived, potential, destabilization of the of the industry. Rather than simply relying on state law to protect the sellers, Congress chose to impose a trust on the parties to such a transaction which, since it creates a fiduciary relationship between the parties, provides the sellers with superior rights over the interests of the buyer's other creditors.

7 U.S.C. § 499e(c)(2) of the PACA statute defines the PACA trust, i.e. the corpus of the trust, as follows:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and **all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products**, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored.

Emphasis added.

Similarly, the pertinent provision of PASA reads as follows:

> All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all

> unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers.

See, 7 U.S.C. § 196(b).

Neither the PACA nor the PASA statutes include real property as a trust asset and the Courts have typically come to the same conclusion. See e.g., *re Magic Restaurants, Inc.*, 205 F.3d 108, 111 (3d Cir. 2000), and *Chiquita Brands Company North America, Inc. v. J & J Foods, Inc.*, 2004 WL 2536860 (E.D. PA 2004). Nevertheless, a New York State court, pursuant to a Summary Judgment Motion, found that the unpaid PACA claimants had a lien on the real estate superior to all other creditors with respect to any mortgage payments the PACA buyer paid on the mortgage securing its real property. The priority date of the PACA lien runs from the date the seller sold the commodities after having given “notice” of its intent to preserve its PACA and/or PASA trust benefits.

The required “Notice” may be accomplished by simply sending a document entitled "Notice of Intent to Preserve Trust Benefits" to the buyer within thirty (30) days after expiration of the parties' payment terms. Alternatively, a produce seller, may preserve its trust rights by merely including a statement on the face of its invoice that the products are being sold subject to the seller’s trust rights. See, 7 U.S.C. § 499e(c)(3). The recording of this Notice, a Notice of Lis Pendens or any other document in the real property records is **not** required.

The types of entities whose assets be subject to a PACA or a PASA lien include restaurants, grocery stores, produce dealers, distributing companies, processing plants, stockyards and cattle and poultry farms. When the transaction being insured pertains to a property of this type, the use of an appropriate exception such as the following should be considered:

> **Any right, interest or claim that may exist, arise or be asserted against the Title under or pursuant to the Perishable Agricultural Commodities Act of 1930, as amended, 7 USC 499a et seq., the Packers and Stockyard Act of 1921, as amended, 7 USC 181 et seq., or any similar state or federal laws.**

Although the risk of a loss is present, at this point we have not seen any claims or experienced any losses. In considering the issues and potential claims losses, ALTA has not yet decided to revise the Policy jackets to specifically exclude such claims form coverage.

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 <u>**only**</u> 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

2. 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:

   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. <u>Home Equity Conversion Mortgage</u>

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 borrower. 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."

ENDORSEMENT SUMMARY

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 2013 revisions run from 1 through 44.

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 1-44

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.

<u>ALTA 9.1-06 Endorsement (Covenants, Conditions and Restrictions Owner's Policy-Unimproved Land)</u>

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.

<u>ALTA 9.2-06 (Covenants, Conditions and Restrictions Owner's Policy-Improved Land)</u>

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.

<u>ALTA 9.3-06 (Covenants, Conditions and Restrictions-Loan Policy)</u>

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.

<u>ALTA 9.4-06 – Withdrawn and no longer available</u>

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 provides 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 less than the combined principal amount of all mortgage 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 that 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.

<u>ALTA Forms 29-06, 29.1-06, 29-2-06 and 29.3-06 - Interest Rate Swap Endorsements</u>

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, and if the insured does not desire any additional coverage, do not leave the entry blank, but instead type in "$0.00."

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 laws 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 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 – Not Yet Available

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.

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. <u>Covered Risks - Matters Occurring After the Date of Policy</u>

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. <u>Other Non-Record Matters - Land Use & Zoning; Covered Risks 16, 18, 19, 20</u>

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. <u>Covered Risks 12 and 13 - Covenants, Conditions and Restrictions</u>

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. <u>Covered Risks 14, 15 and 17 — Violations or Enforcement Actions of Record</u>

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. <u>Deleting Survey or Future Damage Coverage</u>

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.

<u>Additional Exclusions</u>

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.

<u>ALTA Limited Pre-Foreclosure Policy and Date –Down Endorsement</u>

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.

Bankruptcy Sales Free and Clear of Liens

The trustee or DIP may sell real property pursuant to 11 USC 363 (b) (sales other than in the ordinary course of business), or pursuant to 11 USC 363 (c) (sales in the ordinary course of business), free and clear of any interest in such property of an entity other than the estate, with the liens attaching to the proceeds of sale, only if one of the five elements of 363 (f) is present. 11 USC 363 (1) provides:

"(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable non bankruptcy law permits sale of such property free and clear of such interest;
(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

These five elements comprise the statutory underpinnings authorizing a sale free and clear of liens and other interests. Counsel should be aware that this broad grant of authority to sell free and clear of liens and other interests applies to federal and state tax liens as well.[i] The public policy served by this provision can be seen in affording the bankruptcy court the ability to dispose of these claims and interests in one forum, thereby providing a purchaser of the asset the avenue to purchase free of such liens and other interests. This ostensibly provides a purchaser with incentive to pay more for the asset, now free of claims and interests, which results in the additional consideration flowing to the benefit of the estate and its claimants, and maximizing the return on the asset. This policy objective must be balanced with the bankruptcy requisites of adequate protection and adequate disclosure, as well as the bankruptcy axiom, "liens ride through."

With the policy concepts in mind, a closer review of the five elements is in order.

Sale under applicable non bankruptcy law, 363(f)(1), authorizes sale free of liens and interest when applicable non bankruptcy law permits it. This provision is rarely if ever used in a real property asset sale; I am aware of no state law provisions permitting such authorization, since it would mean that a seller of real property could simply sell free of such interests (mortgages, judgments, etc.). It is employed in the personal property arena under the Uniform Commercial Code. The code authorizes the sale of inventory in the ordinary course of business free and clear of security interests.[ii] In the event counsel or underwriters encounter a real property sale authorization pursuant to 363(f)(1), home office counsel should be contacted in order to carefully review the state or other law provision ostensibly relied upon. Again, this is highly unlikely in a real estate transaction.

Sale with consent of lien holders (entities), under 363(f)(2), authorizes a sale free of liens and interests when the holder of the lien or interest consents to the sale. The consent contemplated here is the consent to the sale of the asset free and clear of liens and interests, and not merely consent to a sale of the asset. Disclosure is a watchword in bankruptcy and the party whose interest is affected must have notice that its lien is being released, or divested, with respect to the collateral being sold. The notice of sale must be clear as to this issue. Consent, leaving Stern issues aside, may be express or implied.[iii]

Section 363 (1) (3) provides, when the sale price exceeds the aggregate value of all liens on the property, the sale may be effectuated free and clear of liens, when the sale price exceeds the value of all liens on the property. This provision, consistent with the policy objective to maximize the return to the estate, appears to oblige the court to look not only to the value of the liens, but further as to whether or not there is any equity in the property. The trustee, or DIP, should not need to sell free and clear of liens if the proceeds will simply go to the lienholders anyway. In this instance, the estate will receive no benefit from the sale.[iv]

The courts appear divided on the construction of the language, "the price at which such property is to be sold is greater than the aggregate value of all liens on such property". The split results from a divergence of opinion as to the meaning of the language "aggregate value of all liens"; some courts hold that the phrase means the value as determined by 506 (a), essentially the actual economic value of the lien.[v] The rationale derives from the fact that 506 (a) basically states, that an allowed claim of a creditor secured by a lien on property, in which the estate has an interest, is a secured claim, but only to the extent of the value of such creditor's interest in the estate's interest in such property. Courts adopting this line of reasoning construe the term value, employed in 363 (f) (3), as a term of art, which must in their analysis be consistent with 506 (a); in fact some cases hold that this result is consistent with and buttressed by the code concept of adequate protection which pervades 363 and the code itself.[vi] The term" aggregate value of all liens" means, under this analysis, the aggregate of the allowed secured claims of the secured creditors, as provided for under 506 (a), essentially reducing them to the actual economic value of the lien. Based upon this rationale, the sales price must simply exceed the economic value of the property sold to sell free and clear of liens.

This approach, in my opinion, may present a classic example of strained tautological reasoning in a situation where the property is over encumbered. A criticism I have with this approach is that from a strictly logical standpoint it would only apply where the property is under encumbered, the property has equity. This approach fails to consider the fact that the statute uses the term, "greater than." This becomes problematic with respect to over encumbered property. Many courts, in utilizing this approach with respect to a sale of property, where the property is over encumbered (the liens exceed the value of the property - there is no equity), appear to be ignoring the fact that that they are permitting a sale for a price where the economic value of the liens is the same as the sale price, not greater. Under 506 (a), the secured creditor only has an allowed secured claim to the extent of the creditor's interest, in the estate's interest, in the property. But the economic value of the property, its fair market value, is always determined by what a willing buyer will pay and what a willing seller will offer. The sale price in a 363 (0 proceeding to sell over encumbered property can never be greater than the aggregate economic value of the liens on the property, under this methodology. From a logical standpoint, it would always be the same — the sales price, in the instance of over encumbered property, would be the same as the economic value of all of the liens.

Logic aside, some courts have permitted sales of over encumbered property where the sales price (using strained logic) somehow (?) exceeds the economic value of the property. Other courts, utilizing this approach, sometimes show a modicum of intellectual honesty, and bluntly just permit it; they require only that it be, in their estimation, the best price obtainable under the circumstances of the sale, and in addition require an additional finding of some form of special circumstances to further justify the sale (e.g., rapidly depreciating property values in the market).[vii] They often advert to the need to preserve the value of the collateral. Many courts (usually in a Chapter 11 proceeding, utilizing a pre confirmation 363 (f) sale) have used this approach to sell free and clear of the property rights of junior lienholders whose non bankruptcy liens are not supported by the collateral's value.[viii] That is, there may be a sale free and clear of "out-of-the-money" liens. This 'rough house' approach toward secured creditors is less likely, but not unknown, in a Chapter 7 proceeding, since there the Trustee or Dip is often more inclined to abandon over encumbered property. Again, I find this reasoning, to justify a sale free and clear of liens, somewhat intellectually disingenuous.

The other line of cases, interpreting "aggregate value of all liens", has held that the sales price must exceed the face amount of all liens, a literal interpretation.[ix] This line of reasoning is buttressed by the legislative history.[x] Under this analysis, face amount would be the amount owed to the lien holder, the amount of his full claim (secured and unsecured), not his allowed bifurcated secured claim under 506 (a). This construction is consistent with the literal language of the provision itself and appears to me to be the better reasoned analysis. The language of (f) (3) uses the term "value of all liens" and not the term "value of all claims" which would, if the latter were employed, have been a much more direct reference to valuation as provided for under 506 (a); since, 506 (a) determines the value of claims and not liens. Clearly, the Congress apprehended this distinction in terminology; nonetheless, they used the term "value of all liens." Under principles of statutory construction, where statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result. This lends credence to the branch of cases which hold that the use of the term lien in the statute should be construed to mean the face amount of the lien, i.e., the amount owed to the lien holder. If this were not the case, 363(f)(3) would appear to authorize a sale free and clear of any lien irrespective of whether the lienholder held an allowed claim, which does not appear to be something which Congress intended in the drafting.[xi]

That being said, the construction providing for determining the valuation of liens consistent with 506 (a) - to wit, their economic value - appears to be prevailing in current practice, especially in Chapter 11 cases. In these cases, often due to the practical realities of selling a business as a going concern (in order to maximize the return to the estate), sales have been effectuated free and clear of liens, even secured liens on over encumbered property (the economic value of the liens is less than [using perverse logic], or equal to the sale price of the property). These sales have been effectuated in deference to the pragmatic necessity of getting the business sold at the best price. For our purposes, one needs to be cognizant of the utilized construction, for determining value of liens, in the venue where the court sits; nonetheless, a final non appealable order, irrespective of valuation method chosen, should stand, since it is unlikely that it is jurisdictional in nature -again, Stern concerns aside.

363(f)(4), provides for sale free and clear of liens and interests when such interest is in bona fide dispute. Generally, the burden of proof to prove bona fide dispute rests with the trustee, or DIP[xii]; nonetheless a third party may raise the issue of bona fide dispute and prove its case. The burden is met when either a factual or legal basis is proffered which objectively challenges the validity of the interest disputed. The bankruptcy court need only make a determination that a bona fide dispute exists; it is not required to resolve the dispute in order to authorize a sale under 363 (f) (4).[xiii]

363(f)(5), provides for sales free and clear of liens and interests when such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. This provision requires that there be a real, not hypothetical, legal or equitable proceeding available, where the entity could be compelled, under an existing law, to accept a money satisfaction for its interest. In such a proceeding, the interest would be replaced by cash collateral, or other adequate protection. Non bankruptcy law may, in some instances and jurisdictions, permit the monetary satisfaction of a lien, when the lien holder is paid in full out of the proceeds of sale. But the real question is the ability to sell when the lien holder is not paid in full; the property is being sold for less than the value of the lien. Can the lien holder be made to accept an amount from the proceeds of sale which is less than the value of its lien? Under the Uniform Commercial Code, when collateral is sold to a buyer in the ordinary course of business, the security holder's security interest may be limited to the proceeds on the sale of the collateral.[xiv] In this instance, 363(f)(5) would seem to apply, although it would overlap with 363(f)(1). However, this Uniform Commercial Code provision does not apply in the event of a sale out of the ordinary course of business; in that event, the security interest continues in the collateral purchased by the purchaser — here 363(f)(5) would be of no avail. This approach is unlikely to be of use in a real property context since liens continue as security interests in the hands of a purchaser. I am not aware of any state statutes requiring the holders of real property interests or liens to accept a money satisfaction of their interests, especially when they are not paid in full.

Some cases have suggested that cram down in a chapter 11 case, or interests subject to valuation and distribution in a chapter 7 case, could be construed as interests which could be compelled to accept a money satisfaction.[xv] The logic here is circuitous, since it would require reliance on the bankruptcy code itself to obtain the result, and 363(f)(5) seems to require a legal or equitable proceeding outside of itself, i.e., a non-bankruptcy statute and proceeding. Why would one need 363(f)(5), if one could simply use another bankruptcy code provision? With respect to chapter 11 cram down, to utilize cram down, under 363(f)(5), would sanction the effect of cram down without requiring any of § 1129(b)'s substantive and procedural protections — this would not be an acceptable use. The Ninth Circuit BAP has cogently rejected this line of reasoning in Clear Channel Outdoor, Inc. v. Knupfer[xvi] In addition, the Clear Chanel Court recognized the need to read 363 (f) so that all parts of the statute worked harmoniously together. This follows the legal maxim of construction, "all parts of a statute should be considered together." Thus, to construe 363(f)(5) as applying to any situations where a secured lien could be paid with money would effectively nullify any limitations on sales free and clear of liens as contained in 363(f)(3), the court held,

> "Put another way, any interpretation of paragraph (5) must satisfy the requirement that the various paragraphs of subsection (f) work harmoniously and with little overlap. The bankruptcy court's broad interpretation does not do this. Initially, if the Trustee's and DB's interpretation were accepted, paragraph (5) would swallow and render superfluous paragraph (3), a provision directed specifically at liens. The specific provisions of paragraph

(3) would never need to be used, since all liens would be covered, regardless of any negative or positive relationship between the value of a creditor's collateral and the amount of its claim. A result that makes one of five paragraphs redundant should be avoided."

Indeed, virtually all liens are amenable to satisfaction with the payment of money. To construe 363(f)(5) as applying to these situations would virtually obviate the need for the other elements of 363 (f), (f) (1) through (f)(4); (f)(5) would effectively `swallow' them all. Such a construction would appear to be at odds with the general principles of statutory construction. The Ninth Circuit BAP, in Clear Channel, flatly rejected as too simplistic, any interpretation that construed 363(f)(5) to mean that it applied to any circumstance where the lien or interest holder can be paid with money. They held,

"We do not think that § 363(f)(5) is so simply analyzed. Although it is tautological that liens securing payment obligations can be satisfied by paying the money owed, it does not necessarily follow that such liens can be satisfied by paying any sum, however large or small. We assume that paragraph (5) refers to a legal and equitable proceeding in which the nondebtor could be compelled to take less than the value of the claim secured by the interest. See In re Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002)... Although this view leads to a relatively small role for paragraph (5), we are not effectively writing it out of the Code. Paragraph (5) remains one of five different justifications for selling free and clear of interests, and its scope need not be expansive or all-encompassing. So long as its breadth complements the other four paragraphs consistent with congressional intent, without overlap, our narrow view is justified."

In order for this provision to apply, one would need a non-bankruptcy law, which would compel the holder of a real property lien, or interest, in a legal or equitable proceeding, to accept a money satisfaction for less than its lien.[xvii] I am aware of no such provisions. In the event this provision is relied upon, home office counsel should be consulted. It should have little application to real property liens or interests.[xviii]

It is interesting to note that 363 (f) is written in the disjunctive, meaning the sale free and clear of liens may be effectuated if any one of the elements of 363 (f) has been met. Does this disjunctive format mean that you cannot mix and match the five elements? Use two or more elements in combination to achieve a result that one could not obtain with the use of only one element. The statute does not affirmatively preclude it and most courts have permitted it. Old Republic, as well as other title insurers, has gone along with this approach, provided the circumstances are right, and that the sale was effectuated usually by a final non appealable order, on clear notice.

Some examples of what I mean by mix and match may be instructive here - for example, a sale free and clear of a first mortgage, when the sale proceeds are sufficient to pay off the first mortgage lien, and where the second mortgagee consents to the sale, although the proceeds will not fully pay off the second mortgagee's lien. Another example is where a trustee negotiates a settlement with one lien holder, to take less than the full value of his lien, and the amount of the lien, as settled, is used, in computing the aggregate value of all liens under the (f) (3) calculation (see In re Van Metre, Inc. 155 B.R.118 (Bankr. E.D. Va. 1993)). Arguably, when this is accomplished pursuant to a final order of sale without appeal, the issue, if any, is waived and not jurisdictional, leaving any Stern issues aside here. The garden variety sales under 363 (0 occur when the sale price exceeds the face value of all the liens on the property, or the entities with interests in the property, for example, all secured creditors, consent to the sale. When employing mix and match scenarios it is advisable to consult senior title counsel.

Clearly, in any sale free and clear of liens, you need to examine carefully the elements which I reviewed earlier in connection with sales in or out of the ordinary course of business. In addition, you will want to be certain that all the secured parties listed in the title report have been served with the notice of motion for sale. The notice should be clear and indicate that a sale will be made free and clear of liens — adequate disclosure. Have secured creditors filed notices of claim and to what extent have they participated in the proceedings? Unsecured creditors are also entitled to notice and have a right to object to the sale for cause. Make absolutely certain that the estate has title and that title is not in dispute.

Any sale pursuant to 11 USC 363 (f) is subject to the adequate protection requirements of 11 USC 361. Adequate assurances, adequate protection, and adequate disclosure, these are the watchwords in bankruptcy. The lien creditor must be given something to replace the lien he is losing. Courts usually have deemed that adequate protection is met when the liens are by court order made to attach to the proceeds of sale subject to further disposition by the court. In a section 363 sale, the real estate collateral is replaced by cash collateral - the proceeds of sale.

When a transaction involves a sale free and clear of liens, we will usually insist on a final non-appealable order of sale; we will generally not insure a sale free and clear of liens in the absence of a final non appealable order of court. We generally require an order even though the code contemplates sales free and clear of liens without orders of court in certain circumstances. In fact, as discussed earlier, section 363 (c) sales in the ordinary course of business can be effectuated without notice, hearing, and a court order; even section 363 (b) sales can be accomplished administratively without a hearing and a court order if no noticed creditors object. Nonetheless, due to the high risk in these matters, especially in light of the Stern case, we will usually insist on an order. Counsel must satisfy themselves that all interested parties were served with proper notice and disclosure of the sale, and that a final non-appealable order of sale was entered, which order should provide that the sale is being made free and clear of all liens, with the liens attaching to the proceeds of sale, subject to further disposition of the court. The conveyance will usually recite that it is being made free and clear of all liens pursuant to an order of sale, reciting the court and venue. We usually require that this order be recorded in the land records, which will necessitate the need of a certified copy of the order.

One final comment concerning sales free and clear of liens, we never omit open real estate taxes and assessments, even where the order provides for sale free and clear of all liens, unless the taxes and assessments are paid in full at closing. This comment applies to sales free and clear of liens pursuant to a confirmed Chapter 11 Plan, as well. Many municipalities refuse to remove the taxes from the tax rolls even in the face of an order. This presents a major pragmatic problem and no title company wishes to be placed in the position where it needs to retain counsel to have the taxes removed — the duty of defense, costs of defense can exceed policy amounts.

IV Sales of Property of the Debtor, Free and Clear of Liens, pursuant to a Chapter 11 Confirmed Plan

For purposes of this discussion, we shall assume that counsel has reviewed the chapter 11 proceeding, the plan, its contents, etc. We shall limit this discussion to a plan properly confirmed pursuant to 11 USC 1129, which enumerates the requirements for the court to confirm a chapter 11 plan.

In order to understand the ability to sell property of the debtor, dealt with by the plan, free and clear of any liens, one must first understand what the effect of a confirmation of a chapter 11 plan is.

The governing provision here is 11 USC 1141. This section describes the effects of a plan confirmed by order of the court. Section 1141 (a) states that the provisions of a confirmed plan bind the debtor, any entity issuing or acquiring property under the plan, and any creditor of or equity security holder or general partner in, the debtor. Subdivision (b) states - except as may be otherwise provided in the plan or in the order confirming the plan - confirmation of a plan vests all property of the estate in the debtor. This is important; the property is no longer property of the estate, but now is property of the debtor. Again, as I mentioned with respect to Section 363, you must determine that title is properly vested in the debtor; if it isn't, the sale should not go through.

Subdivision (c) provides - except as provided for in subsections (d) (2) and (d) (3) of section 1141, and except as otherwise provided for in the plan or the order confirming the plan - property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders and general partners. It is if you will a default provision, in the event the plan or order are silent as to such claims or interests.

Section 1141 (c) may also be interpreted as providing for an *in rem* discharge of property of the debtor that effectively parallels the *in personam* discharge provided for in 1141 (d). This provides insight into the meaning of the phrase in 1141 (c), "...except as provided for in subsections (d) (2) and (d) (3)..." The *in rem* discharge of property dealt with by the plan from all claims and interests of creditors, is excepted from discharge, where the debtor would be excepted from discharge personally. Section (d) (2), excepts the in rem discharge of liens, for an individual debtor, where the debts of the debtor, would be excepted from discharge under 11 USC 523. Section (d) (3) deals with a discharge in a liquidating Chapter 11 case, here a non-individual debtor, a partnership or corporation is not entitled to an *in rem* discharge of the property dealt with by the plan, if its plan provides for liquidation of all or substantially all of its assets, and the debtor does not thereafter continue in business; this is because, 11 USC 727 (a) (1) denies a discharge, in a chapter 7 case, where the debtor is not an individual. That is not to say that the plan or order confirming the plan may not otherwise explicitly provide for a sale of real property free and clear.[xix]

Section (d) is the provision which generally provides for the discharge of debts that arose before the plan confirmation, as well as termination of the rights of equity security holders and of partners who are provided for under the plan. The discharges and terminations are subject to the section 523 exceptions to discharge in the case of an individual, and to the section 727 exceptions to discharge in the case of a liquidating plan by a non-individual debtor.

The effect of the entry of an order of confirmation, except as otherwise provided for in the plan or the order, is that upon entry of the order pursuant to 11 USC 1141 (b), it vests title to property of the estate into the debtor. Section 11 USC 363 authorizes only transactions with respect to property of the estate. Therefore we need to look to 11 USC 1141 (c), which states the general rule - subject to the provisions of 11 USC 1141 (d) (2) and (d) (3), and of course the order or any contrary provisions in the plan - property dealt with by the plan, is transferred or retained by the debtor free and clear of all claims or other interests of creditors.

Claim, lien, judgment lien, are all defined terms under 11 USC 101, and as such are all subsumed and included under the general rule enunciated in 1141 (c) — " free and clear of all claims or other interests of creditors." This would include federal and state tax liens.[xx]

Now, in order for property to be freed of claims and interests, the property must be dealt with by the plan. If the plan fails to schedule, or mention, or to provide for a particular property, that property will not be freed of claims and interests pursuant to section 1141 (c). Conversely, should the plan, or the order, provide for the vesting of the property in the debtor, or for the transfer of the property to a third party subject to the lien, then the lien will not be extinguished, the terms of the plan or order will control. The orders, the plan, and any amendments must be examined carefully.

Section 1141 (c) is interpreted by many as the provision that permits a plan to extinguish, or divest, liens on or other interests in property. It is essentially a default provision. Nonetheless, this default provision is in conflict with another stated principle in bankruptcy, to wit: liens pass through bankruptcy unaffected - they do of course, unless brought into the bankruptcy and properly dealt with and extinguished in the proceeding.

Due to this conflict, several appellate courts have engrafted an additional judicial requisite into 1141 (c), they mandate that in order for a lien to be extinguished, not only must the property be dealt with by the plan, but the creditor whose interest is to be extinguished, must also have " participated in the proceedings." The court in the Seventh Circuit Penrod decision[xxi], framed the issue as, "we must decide whether preexisting liens survive a reorganization when the plan (or the order confirming it) does not mention the liens. What in other words is the default rule when the plan is silent?" The court in Penrod held that for a secured creditor who files a notice of claim, for which provision is made for in the plan, the default rule would apply. Therefore, in the event of silence, the lien would be extinguished, unless the plan or order provided for its continuance. That would not be the case if no proof of claim were filed, or there were no other meaningful participation by the secured creditor, as well as no provision made for the secured creditor, in the proceeding.

We as a general principle do not rely on the default provision; we usually require that the order or plan explicitly contain a clear provision providing for the extinguishment of the lien. This, in addition, provides notice to a secured creditor that its lien will not survive, and gives them an opportunity to object; remember, adequate disclosure. Again, due to Stern concerns, we always want to be sure that a secured creditor was give notice of the proceeding and an opportunity to object. It is helpful if secured creditors filed notices of claim, although mere failure to file does not void their secured status, 11 USC 506 (d). To what extent can we confirm they participated in the proceedings? We, in addition, will usually always want a final non appealable order of confirmation. Here again, the plan, any amendments, along with the order of confirmation, or supplemental orders must be examined to determine that the liens are properly released. A copy of the order of confirmation, especially where providing for sale free and clear of liens and interests, should be recorded in the land records, along with the deed. The deed should contain adequate recitals, especially if the property is being conveyed free and clear of liens, along with the recitals of the court, venue, and order under which it is being delivered.

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[i] Section 363 (f) provides, in pertinent part, as follows, "(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate".

Entity is a broader term than person, it includes governmental entities, it is defined as follows:

"101 (15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee."

Governmental unit in turn is defined under the code to mean:

"(27) The term **"governmental unit" means United States; State**; Commonwealth; District; Territory; **municipality;** foreign state; **department, agency, or instrumentality of the United States** (but not a United States trustee while serving as a trustee in a case under this title), **a State, a Commonwealth, a District, a Territory, a municipality**, or a foreign state; or other foreign or domestic government."

It is interesting to note that section 106 provides for the waiver of sovereign immunity, as to a governmental unit, as follows:

"§ 106. Waiver of sovereign immunity
(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections **105**, 106, 107, 108, 303, 346, 362, **363**, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, **1146**, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title [11 USCS §§ 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749,

764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and *1*327]."

In addition see, USA v. Booth Tow Services, Inc., 64 B.R. 539 (USDC,WD Missouri, 1985).

[ii] U.C.C. Section 9-320 (a purchaser in the ordinary course takes free of security interests).

[iii] See, FutureSource LLC v. Reuters Ltd., 312 F.3d 281 (7th Cir. 2002) , cert. denied, 538 U.S. 962, 123 S. Ct. 1769, 155 L. Ed. 2d 513 (2003) (consent implied from failure to object, provided there was adequate notice); Veltman v. Whetzal, 93 F.3d 517 (8th Cir. 1996) (failure to object to proposed sale, coupled with stipulation on authorizing sale free of interest, constituted consent); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343 (E.D. Pa. 1988) (implied consent found); Hargrave v. Pemberton (In re Tabore, Inc.), 32 C.B.C.2d 1239, 175 B.R. 855 (Bankr. D.N.J. 1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of section 363); In re Shary, 152 B.R. 724 (Bankr. N.D. Ohio 1993) (state's failure to object to transfer of liquor license constituted consent to sale); but see, Contra In re Roberts, 249 B.R. 152 (Bankr. W.D. Mich. 2000), (court held that the consent required by 11 U.S.C.S. § 363(f)(2) could not be implied from the lienholder's failure to object to a trustee's motion to sell property of the estate free and clear of a lien. Consent and failure to object were not synonymous.).

[iv] See, In re Riverside Inv. Partnership, 674 F.2d 634 (7th Cir., March 1982), (As a general rule, the bankruptcy court should not order property sold "free and clear of" liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate. See Freeman Furniture Factories, Inc. v. Bowlds, 136 F.2d 136, 140 (6th Cir. 1943); Hoehn v. McIntosh, 110 F.2d 199, 202 (6th Cir. 1940); In re Unikraft Homes of Virginia, Inc., 370 F. Supp. 667, 670-71 (W.D.Va.1974); In re Bernhard Altmann International Corp., 226 F. Supp. 201, 205-06 (S.D.N.Y.1963). Cf. Standard Brass Corp. v. Farmers National Bank, 388 F.2d 86, 89 (7th Cir. 1967) (trustees abused discretion by selling property free of lien when sale returned no equity to bankrupt's estate).).

[v] See, In re Beker Indus., Inc., 15 C.B.C.2d 52, 56-57, 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986) ; see also In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995) ; In re WPRV-TV, Inc., 143 B.R. 315, 320 (D.P.R. 1991) ; In re Milford Group, Inc., 150 B.R. 904, 906 (Bankr. E.D. Pa. 1992) ; In re Oneida Lake Dev., Inc., 23 C.B.C.2d 143, 114 B.R. 352 (Bankr. N.D.N.Y. 1990) ; In re Terrace Gardens Park P'ship, 20 C.B.C.2d 1183, 96 B.R. 707 (Bankr. W.D. Tex. 1989).

[vi] See, In re Terrace Gardens Park Partnership, 96 B.R. 707, (The court here essentially followed the line of reasoning that the requirement that the sale price exceeds the aggregate value of all liens simply requires that a sale price need only exceed the value of the property, relying on the definition of a secured claim in Section 506(a), which

equates such a claim to the value of the collateral securing the claim. In re Beker Industries Corp., 63 Bankr. 474 (Bankr. S.D.N.Y. 1986), The court in Terrace used the adequate protection mandate to buttress this approach- ("Sections 361-364 all address the treatment of secured claims in a bankruptcy case. All four sections employ the common concept of adequate protection as the touchstone for whether a debtor's proposed action should be approved. Adequate protection in turn focuses on the value of the collateral securing the claim. So long as a creditor's interest is adequately protected, the debtor is permitted to sell property of the estate. 11 U.S.C. § 363(e). It makes no sense to read into Section 363(f)(3) a restriction inconsistent with the adequate protection scheme which pervades both Section 363 and the rest of the Code, just because the sale is free of liens, especially as the commonly accepted method for adequately protecting a secured creditor when a sale is authorized under Section 363(f) is to order the liens to attach to the proceeds of the sale.")

[vii] See, In re Oneida Lake Dev., Inc., 114 B.R. 352, (Bankr. N.D.N.Y. 1990), (the Court must conclude that the proposed sale price is the best price obtainable under the circumstances, id. citing In re Hatfield Homes, Inc., 30 Bankr. 353, 355 (Bankr. E.D.Pa. 1983) and further that it must find special circumstances justifying the sale for less than the amount of liens over the objection of a secured creditor, id. citing In re Bernhard Altmann International Corp., 226 F. Supp. 201, 205-07 (S.D.N.Y. 1963); In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995).

[viii] See, In re Terrace Gardens Park P'ship, 96 B.R. 707 (Bankr. W.D. Tex. 1989); In re Oneida Lake Dev., Inc., 114 B.R. 352 (Bankr. N.D.N.Y. 1990); Milford Group, Inc. v. Concrete Step Units, Inc. (In re Milford Group, Inc.), 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992); In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995)

[ix] See Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008),(" § 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold.") ; Criimi Mae Servs. Ltd. P'ship v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527 (D.N.J. 2003), (The court in an excellent discussion followed the "rule that "the bankruptcy court should not order property sold free and clear of liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate."); Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821 (N.D. Ill. 1993) ; In re Perroncello, 31 C.B.C.2d 781, 170 B.R. 189 (Bankr. D. Mass. 1994) ; see also In re Healthco Int'l, Inc., 32 C.B.C.2d 476, 174 B.R. 174 (Bankr. D. Mass. 1994) ; George W. Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L.J. 235 (2002) Matter of Stroud Wholesale, Inc., 47 Bankr. 999 (E.D.N.C. 1985), aff'd sub nom., Richardson v. Pitt County, No. 85-1422 (4th Cir. Jan. 21, 1986); In re Red Oak Farms, Inc., 36 Bankr. 856 (Bankr. W.D.Mo. 1984); In re Bobroff, 40 Bankr. 526 (Bankr. E.D.Pa. 1984); In re Murphy, 34 Bankr 78 (Bankr. D.Md. 1983); Matter of Riverside Investment Partnership, 674 F.2d 634 (7th Cir. 1982).

[x] See, H.R. Rep. No. 595, 95th Cong., 1st Sess. 345 (1977), reprinted in App. Pt. 4(d)(i) infra; S. Rep. No. 989, 95th Cong., 2d Sess. 56 (1978), reprinted in App. Pt. 4(e)(i) infra.

[xi] See Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008)

[xii] See Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 828 (N.D. Ill. 1993) (citing Octagon Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)), ("A trustee can sell estate property free and clear of a lien if the lien is in bona fide dispute. The trustee has the burden of establishing the existence of a bona fide dispute.").

[xiii] See, In re Octagon Roofing, 123 B.R. 583, ("The term "bona fide dispute" is not defined in § 363(f)(4) of the Code. However, the term "bona fide dispute" is also used in the Bankruptcy Code at 11 U.S.C. § 303 in connection with the nature of claims asserted as basis for an involuntary Chapter 7 petition. To determine in this Circuit what constitutes a bona fide dispute, "the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt." In re Busick, 831 F.2d 745, 750 (7th Cir. 1987). Under this standard, a court need not determine the probable outcome of the dispute, but merely whether one exists. Id. No authority has been cited showing that "bona fide dispute" has any different meaning when used in 11 U.S.C. § 363(f)(4), and the parties each agreed before this Court that the foregoing standard applies here. That standard has been met by the evidence presented. This Court rejects cases from other jurisdictions cited by Trustee that implied or found that merely alleging a dispute is enough to meet the burden under 11 U.S.C. § 363(f)(4). The standard in Busick requires, at least in this Circuit, some factual grounds to show that there is "an objective basis" for the dispute. In the context presented here, that standard requires evidence, and such evidence was presented.); See also, In re Collins, 180 B.R. 447, ("The Court is also called upon to interpret the phrase "bona fide dispute" in § 363(f)(4) which is undefined in the Code... The standard adopted by the Seventh Circuit Court of Appeals states that courts must determine "whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." In re Octagon Roofing, 123 Bankr. 583, 590 (Bankr. N.D.Ill. 1991) (citing In re Busick, 831 F.2d 745, 750 (7th Cir. 1987)). Clearly this standard does not require the Court to resolve the underlying dispute, just determine its existence. Courts utilizing this definition have held the parties to an evidentiary standard: evidence must be provided to show factual grounds that there is an "objective basis" for the dispute.)

[xiv] See, U.C.C. §§ 9-320 (buyer in ordinary course of business takes free of security interest); 9-315(a)(2) (security interest attaches to proceeds of collateral).

[xv] See, e.g., In re Gulf States Steel, 285 B.R. at 508; In re Grand Slam USA, Inc., 178 B.R. 460, 462 (E.D. Mich. 1995); In re Healthco, 174 B.R. at 176; In re Terrace Chalet Apts., 159 B.R. at 829.

[xvi] See note xxvii, infra.

[xvii] For an excellent discussion of 363 (f) (5) see, Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008).

[xviii] That is not to say that there is never a fact pattern where 363 (f) (5) would not apply, its application while limited would appear to apply to fact patterns as follows, one might be a buy-out arrangement among partners, in which the controlling partnership agreement provides for a valuation procedure that yields something less than market value of the interest being bought out. See, e.g. , De Anza Enters. v. Johnson, 104 Cal. App. 4th 1307, 128 Cal. Rptr. 2d 749 (Cal. Ct. App. 2002) (joint venturer may compel specific performance of buyout of other venturer's interest pursuant to joint venture agreement); Oliker v. Gershunoff, 195 Cal. App. 3d 1288, 241 Cal. Rptr. 415 (Cal. App. 2d Dist. 1987) (statute provided that partnership could compel buyout of withdrawing partner for a fair price to be determined by several factors). Another might be a case in which specific performance might normally be granted, but the presence of a liquidated-damages clause allows a court to satisfy the claim of a nonbreaching party in cash instead of a forced transfer of property. See, e.g., O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 781 N.E.2d 1114, 269 Ill. Dec. 924 (Ill. App. Ct. 2002). Yet another might be satisfaction of obligations related to a conveyance of real estate that normally would be specifically performed but for which the parties have agreed to a damage remedy. S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Automotive Group, LLC), 2008 Bankr. LEXIS 812, 2008 WL 725102 (Bankr. S.D. Fla., Mar. 17, 2008). In these cases, a court could arguably compel the holders of the interest to take less than what their interest is worth.

[xix] Stern issues aside, see, 11USC 105, in excerpted part, § 105. Power of court "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process..."

[xx] 11 USC 101(10) (A) provides that "the term "creditor" means-- (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;"
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It is interesting to note that section 106 provides for the waiver of sovereign immunity, as to a governmental unit, as follow:

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(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title [11 USCS §§ 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327]."

In addition see, USA v. Booth Tow Services, Inc., 64 B.R. 539 (USDC,WD Missouri, 1985).

[xxi] In the Matter of Penrod, 50 F. 3d 459 (7th Cir., March, 22, 1995), see also, In re Be-Mac Transport Co., 83 F.3d 1020 (8th Cir. 1996) The court citing the premise that liens ride through bankruptcy unaffected, stated, "where a plan does not expressly preserve a lien, a lienholder may lose it after confirmation of the plan, provided that the lien holder participated in the reorganization and its property was dealt with by the plan."