

# Title Management Today™

## Title Comments™

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### **Title Insurance Coverage, a refresher course**

Editor's Note: As we have previously stated, **TITLE MANAGEMENT TODAY** is committed to building upon and enhancing its value for our subscribers. This issue is written primarily for the benefit of title counsel and particularly new underwriters who have recently entered the industry, irrespective of their previous experience.

Some of you may recall that back in the May 2000 issue of this publication we presented an article prepared by James M. Pedowitz, formerly First Vice President and Chief Counsel for the Title Guarantee Company in New York City who is now in private practice. That article is reprinted and presented here once again in its entirety, followed by a list of related articles accompanied by recital where they may be found. Below is Mr. Pedowitz original article printed in full. We conclude with how counsel might maximize the benefit of the title insurance coverage obtained.

### **What Title Insurance Does Not Cover**

Title Insurance is essential in almost every real estate purchase, mortgage or important leasehold transaction, and its coverages are extremely important, but the protection is limited. Attorneys, owners and lenders must not only understand what is covered but must also understand what their title insurance policy *does not cover*.

Each of the coverages listed in the title policy is important. Many lawyers and insureds are familiar with them. They also generally understand the Schedule B exceptions, although not always their full effect. Much less is known or understood about the exclusions from coverage. Even less is known or understood about the conditions and stipulations (hereinafter "C&S"), the so-called "boilerplate" provisions that impact on and diminish coverage. None of these factors should be considered alone. The policy coverage depends on the interplay of all of those elements of the policy.

### **Matters Not Insured**

Some appreciation of the foregoing can be gleaned from the following points (without citations and not nearly complete) setting forth what the American Land Title Association (ALTA) policies now in use (absent some special endorsement, if available and appropriate), *do not insure*.

1. The value of the property – or that it has any value at all.

2. The manner in which the property can be used or that the property can be used for any economic purpose at all.
3. That a building permit can be obtained to build on or alter the property, not even to make a curb cut.
4. That absent an appropriate zoning endorsement (which is not available in some states, such as New York), that there is no zoning violation unless notice thereof has been recorded in "Public Record" (as defined in the policy) – and they rarely are.
5. That even if property zoned, that no special permits are required for the present use of the property and, if required, have been or kept in force.
6. That an insured mortgage will be paid or that a mortgage foreclosure will not be delayed and, when finally completed, will yield any proceeds to the insured.
7. That the insured premises are not contaminated with hazardous materials or even that any environmental laws have not been violated, unless the violation is noted in those "public records" as defined in, and limited by, the policy.
8. That even if an undisclosed defect, lien or encumbrance affecting the property exists, it will result in a compensable "loss" payable under a loan policy.
9. That damage or loss caused by activities on adjacent properties, such as flooding, lack of adjacent support, or disturbance of the surface by mineral exploration or removal would be compensable under the policy.
10. That any well, cesspool or septic tank servicing the property lies within the perimeter lines of the premises, or that utility lines servicing the premises will continue to be permitted to do so.
11. That a title problem not excepted by the policy and which causes loss to the insured, but which is timely cured by the title insurer will be compensable to the insured. It does not matter in most states that the title problem was not excepted because of a negligent title search.
12. That a fee policy may give no protection for monetary loss notwithstanding defects, liens, encumbrances or other matters not excepted if the amount of unpaid insured mortgages equal or exceed the face amount of the fee policy (except for costs incurred under the defense obligation).

All of the foregoing can be gleaned from a careful reading and understanding of the Exclusions from Coverage, and the Conditions and Stipulations.

### ***Survey Coverage***

One of the subjects on which there is considerable misunderstanding is the matter of so-called survey coverage in title insurance.

The basic ALTA Title Policy does not insure the accuracy of a land survey used by the title insurer in connection with the transaction. This broad assertion requires some amplification.

The ALTA Title Policy form makes not reference to a survey or any state of facts that a survey would disclose. However, it does insure against loss by reason of title defects, liens, encumbrances or unmarketability of title, among other things. An accurate survey can disclose facts that may evidence a title defect, such as possible adverse possession, prescriptive rights boundary problems, errors in the record description, etc., and encumbrances such as easements, encroachments, etc., some of which can result in "unmarketability of the title." For that reason, basic title insurance underwriting requires a Schedule B exception, such as "any statement of facts that an accurate survey would disclose" in the absence of a survey acceptable for use by the title insurer.

A Similar exception also is added frequently as to facts that a physical inspection would disclose. These two basic exceptions usually are deleted by "extended coverage", which may be given by the policy and based upon a survey acceptable to the insurer, in which case, new exceptions may be added based upon the survey reading and inspection report.

However, unless poorly phrased, those substitute exceptions do not result in insurance of the accuracy or the entire survey. The survey is merely the basis upon which the title insurer omits the more-general survey exception and substitutes the new exceptions, if any, based upon what the survey has disclosed. Of course, if that survey erroneously does not show an encroachment or some other fact that adversely affects marketability of title or some other insuring provision, that omission can result in a loss to the insurer under the policy. So, to the extent that the survey error was incorporated into the policy by reading in the error, it can be argued that the survey was "insured," but that would be wrong. What was insured was what was set forth in the insuring provisions, such as that the title was not unmarketable, or that it was free from defects or encumbrances, except as disclosed by the Schedule B. exceptions, which insurance may have been in error because the survey was in error.

Although the title insurer relies on the accuracy of the survey in either deleting, modifying or inserting Schedule B exceptions, it is not normally its intention to act as an insurer or guarantor of the accuracy of the entire survey. That is why the insured should and usually does require that the survey be certified or guaranteed to it as well as to the title insurer. That certification or guaranty creates the contractual privity between the surveyor and the named parties to whom the surveyor recognizes a duty of accuracy as to what is shown on the survey map.

Endorsements to the policy can create insurance coverage that would not exist without them. Some of them deal with the survey. The supplemental materials for the 1989 PLI title insurance program: "Negotiating Additional Coverages" contained various forms of endorsements, including: "Butting Direct Endorsement, Location Endorsement-Survey,

Encroachment Endorsement, Adjoining land, Encroachment Endorsement, Easement; plus Various California (CLTA) Endorsement Coverages."

Additionally, in some states, various additional custom-crafted endorsements may be available that add many more assurances that are survey related.

In some cases, the normal non-insurance of survey accuracy may be construed judicially as having been transformed into insurance by inappropriate underwriting language in a Schedule B exception dealing with the survey. Starting with the doctrine of "reasonable expectations" in insurance policy litigation, to which we add the principle of construing language against the drafter in a contract of adhesion, such as a title policy, what might a Court do with a Schedule B exception that reads:

*Guaranteed survey made by Accurate Surveyors, Inc. dated October 29, 1966 shows a one-story brick commercial building set back 26.5 feet from the street; a separate 4-vehicle garage 1.24 feet clear of the easterly line; 12 marked parking spaces; curve cut into legally opened First Avenue; asphalt driveway leading from street to garage; 6-feet high chain-link fence on rear line; no variations*

What might a Court hold if it was determined that the building was in fact set back only 23.5 feet from the street; that the chain-link fence was actually 18 inches inside the rear line; and that an enforceable set-back covenant and restriction (excepted in the policy without affirmative insurance) required a 25-foot set-back from the street? What are there were only 10 parking spaces of sufficient width to satisfy the local zoning ordinance?

A knowledgeable title underwriter would either have raised no exception based on that survey or merely have written: "No survey variations, as shown on survey made by Accurate Surveyors, Inc., dated October 29, 1996."

### **Exclusions From Coverage**

The Exclusions from coverage in the ALTA policies are significant. Every attorney and other user of title insurance should be familiar with them. Exclusion No. 1 appears in both the Owner's and Loan Policies.

1.(a) *Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land, (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.*

(b) *Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof of a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.*

The effect of Exclusion 1(a) is to eliminate any possible coverage by reason of the existence or violation of practically every type of building or zoning law, ordinance or regulation, environmental protection laws, or the adverse effect or result of any improper or unlawful lot subdivision, whether current or *back in the chain of title*; unless there is some notice (not other wise excepted) in the 'public records" (as defined in the C&S), as of the date of the policy, of the enforcement thereof affecting the insured property, or of some defect, lien or encumbrance affecting the property resulting from the violation or alleged violation.

In many states ALTA Zoning Endorsements or other zoning endorsements may be available to provide some assurances as to applicable zoning and compliance with them by existing structures, but even those endorsements have only limited coverage.

The effect of the "subdivision" exclusion is also most significant, especially as to those lot subdivisions that occurred back in the chain or title. Inquiry should be made as to the date that any such subdivision law may have become effective as to the insured parcel, and, if applicable, some assurance must be obtained as to compliance therewith by the insurance parcel.

Although environmental protection laws pretty clearly come within the other broad land use and police power language of Exclusion 1, the specific words "environmental protection" were added in 1987 in order to make it crystal clear that the policy did not cover it unless the public records disclosed a violation.

1(b) excludes from coverage any other exercise of governmental police power not specified in 1(a), with the same exception as to notice in the public records as of the date of the policy with respect to its exercise, or as to violations resulting in a title defect, lien or encumbrance. The breadth of this police power exclusion can be gleaned from a holding that the denial or a curb cut for commercial driveway was an exercise of the police power, <sup>1</sup> notwithstanding that the inability to obtain the curb cut frustrated the known proposed use of the parcel as a "drive in" establishment.

Other examples that have been held to be the exercise of police power are the adoption of a local improvement ordinance for sewer installation (prior to confirmation of the assessment), <sup>2</sup> municipal code violations, including certificate of occupancy violation; and location within a flood plain zone.

Exclusion No. 2 also appears in both the Owner's and Loan Policies.

*2. Rights of eminent domain, unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.*

This exclusion would have practically no effect in many states (i.e. New York) because of its limiting language and the State's eminent-domain taking statutes that provide record notice.

Exclusion No. 3, which also appears in both the Owner's and Loan Policies (with only minor variations), is the one most frequently utilized by title insurers in defending against claims made by an insured.

3. Defects, liens, encumbrances, adverse claims or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) no known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured under this policy; (c) resulting in no loss or damage to the insured claimant; (3) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have sustained if he insured claimant had paid value for the estate or interest insured by this policy.

A good starting point for research on this subject could be the now 22-year-old Annotation entitled "Title Insurance: Exclusion of Liability for Defects, Liens or Encumbrances Created, Suffered, Assumed or Agreed to by the Insured." <sup>3</sup> More current decisions can be found in Title Insurance Law Handbook by Robert E. Ellis and its Supplements published by Law Text Publishing Company in Chicago. Mr. Ellis was for many years Claims Counsel for Chicago Title Insurance Company.

Each of the words "created," "suffered," "assumed" or "agreed to" have separate meanings. Mr. Ellis' book at page 323 in its summary of *First National Bank and Trust Company of Port Chester v. N.Y. Title Insurance Co.*, <sup>4</sup> summarizes these definitions from the decisions as follows:

"Created." The word "created" was said to have "reference to some affirmative act on the part of the [insured]." And it was held that the insured had taken the mortgage "but .... Did not create the defect. That was created by operation of law."

"Suffered." As to the term "suffered," the Court noted that it "has been variously defined, as to allow, to let, to permit...It has been said that every definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission and intention that what is done is to be done....That Federal Court did not adjudge that there was any actual intent on the part of [assured] to obtain a preference.... The mortgage could constitute a preference without such an actual intent on the part either of the mortgagors or the mortgagee."

"Assumed or agreed to." The words "assumed or agreed to" were held to import some particular defect or encumbrance assumed or agreed to in connection with the conveyance to the insured or "some collateral agreement made...with reference to the subject."

Another point that must be emphasized in analyzing the (b) portion of Exclusion 3 dealing with matters not "known" to the Company, but "known" to the insured and not disclosed to the Company in writing before it became an insured under the policy, is the definition in C&S 1(c) as to:

*"Knowledge" or "known:" Actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matter affecting the land.*

It should also be noted that there is no requirement for any disclosure to the insurer as to matters recorded in the public records.

[Ed. Note as to Ex Cl. 3(c) *Resulting in no loss or damage to the insured*. See also C&S 7 (a)(ii) and 60 ALR 2d 972 relating to Measure of Damages]

Another significant point to an insured claimant who becomes entitled to policy coverage subsequent to the issuance of the policy is that the requirement to disclose adverse matters is still applicable. It even applies to matters that were learned after the date of policy if it was still prior to the date that the claimant becomes an insured. So, a potential assignee of an insured mortgage who will become an insured when it accepts assignment of an insured mortgage will not be covered with respect to off-record defects, etc. that it has not disclosed in writing to the title insurer.

It should also be noted that there are several references in the exceptions to the Exclusions from Coverage as to matters disclosed in the "public records," a term that is specifically defined in C&S, #1(f) as:

*"Public records:" Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions from Coverage, "public records" shall also include environmental protection liens filed in the records of the Clerk of the United States District Court for the District in which the land is located.*

Special note should be made of the fact that the term applies only to records established under "state statutes" enacted for the purpose of imparting the constructive notice specifically set forth in the definition. As such, it will most likely not apply to numerous types of other records that one might mistakenly believe are public records, such as federal records, including those involving bankruptcy (unless also provided for by a State's statute), municipal records, tax records special district records, and various Court records.

Exclusion 3(c) suspends the ability to collect under the policy until the insured claimant can establish that it has suffered loss or damage. The net effect of this Exclusion is that even though a defect, lien, encumbrance or adverse interest has surfaced, other than the right to a defense, the insured may not yet be able to claim payment of a loss. This is particularly true under a loan policy prior to completion of a foreclosure.

Under a loan policy, the fact that a loss has occurred, as well as the amount of loss, may be difficult or impossible to establish until after enforcement efforts have been exhausted. For example, XYZ Bank has a loan policy covering a \$300,000 first mortgage made by John and Mary Doe on a substantial one-family residence. The loan goes into default and XYZ Bank orders a mortgage foreclosure search before commencing the action. The foreclosure search discloses a prior mortgage in the principal amount of \$200,000 recorded about three (3) years earlier, which the title insurer failed to disclose. XYZ Bank calls its title insurer, who may respond by asserting that XYZ Bank has not yet suffered a loss notwithstanding their error. In most states, this is the law.

Exclusion 1(d) protects the title insurer against claims based on matters, including charges, liens, or encumbrances, that may have existed on the date of the policy, but which did not "attach" until after the policy date. This problem arises most frequently with respect to special assessments for improvements. The general rule is that unless the lien has attached by the date of the policy, the title insurer need not pay.

Exclusion 1(e) does not affect the normal purchase or loan transaction. If, however, title insurance is being purchased to cover an estate or interest received as a gift, unless some special endorsement can be obtained, which is usually unlikely, any loss suffered because the insured is not a B.F.P. will have to be borne by the insured, and not the title insurer.

Exclusion 4 in the Owner's Policy and Exclusion 7 in the Loan Policy are commonly referred to as the "creditor's rights" exclusion, which as revised 10/17/92 now reads:

(Owner's) – "Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws that is based on:

1. the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or transfer; or
2. the transaction creating the estate or interest insured by this policy being deemed a preferential transfer, except where the preferential transfer results from the failure to timely record the instrument of transfer or the failure of such recordation to impart notice to a purchase for a value or a judgment or lien creditor."

(Loan) – "Any claim which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors rights laws that is based on:

1. the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
2. the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
3. the transaction creating the interest of the mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure to timely record the instrument of transfer or the failure of such recordation to impart notice to a purchases for value or a judgment or lien creditor.

Although endorsements should be available to modify or delete this Exclusion in appropriate circumstances, there has been a reluctance to do so on the part of most title insurers, and as of not, New York is still among the States where no such endorsement can be obtained.

It should be noted, though, that the Exclusion applies only to the current transaction creating the insured estate or interest, and not to any prior transfer.

The remaining two Exclusions are found only in a Loan Policy and deal exclusively with mortgages.

ALTA Loan Exclusion No. 5 pertains to violations by the insured of usury or consumer protection or truth in lending laws. Lenders generally recognize that these are risks that they and they alone should assume. However, in some states, some form of coverage against loss by reason of a defense of usury is available.

ALTA Loan Exclusion No. 6 (which does not apply in New York because of New York's Lien Law) deals with statutory liens for services, labor or materials (mechanic's liens), and makes it clear that any such lien arising from an improvement that is contracted for and commenced subsequent to the date of the policy is excluded from coverage unless the improvement is financed in whole or in part by the proceeds of the loan and mortgage that is being insured. This Exclusion ties in with insuring Provision 7 in the ALTA Loan Policy which, in New York, is superseded by the broader statutory lien coverage in the New York Endorsement.

### ***The Conditions and Stipulation ("C&S")***

As with all "boilerplate," there can be hidden traps for insureds lurking in this technical language, and it should be read carefully. Although most of the C&C are the same in both the Owner's and Loan Policies, there are variations, some of which can be quite significant.

Some of the highlights in the C&S that have significant as to what is not insured start with the definitions in C&S 1. Unless you come within the definition of "insured," you have no coverage under the policy.

The named "insured" is obviously the beneficiary of the title insurance, but the definition in C&S 1(a) may also include parties other than the named insured. These definitions should be read together with C&S 2 on "Continuation of Insurance", which deal with the continuation of coverage even after a conveyance by an owner, to a limited extent, and which, after assignment of the insured mortgage, provide coverage to the assignee.

With one exception, an Owner's Policy cannot be assigned to or benefit a new owner; not even to a related party such as a corporate affiliate, partnership or trust, etc., without the benefit of a specific endorsement. The exception is found in the language of the Owner's Policy definition in C&S 1(a):

- a. "Insured." The insured named in Schedule A, and, "*subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest to the named insured by operation of law as distinguished from purchase including, but not limited to, heirs distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.*" (emphasis added)

The definition of "insured" in the Loan Policy is much more inclusive and includes all subsequent owners of the indebtedness, with some minor conditions.

Notwithstanding that a claimant fits within the definition of an insured, the benefits of the insurance can be lost by failure to comply with the provisions for Notice of Claim (C&S

3), Proof of Loss (C&S5), or the required degree of cooperation and aid (C&S 4(d) to the insurer.

C&S 6, 7, 8 and 9 contain important limitations on the determination of and extent of liability of the insurer under the policies, as well as the options available to them to limit or terminate the policy liability. The insurer is given an option to make payment of the amount of the insurance policy, plus other accrued covered expenses, and thereby cut off all then-existing and future liability, including the conduct of pending litigation.

C&S provision 8 can also take away from the amount of the insured's recovery under the policy in the event of a covered loss. These provisions permit the insurer to make a pro-rate apportionment of its policy liability among two or more separate and independent parcels contained within the Schedule A description of the premises if not used as a single site. If in fact a policy covers two or more separate parcels that are more valuable in combination than separately, this problem should be addressed by an endorsement.

Under C&S 9(b) of the Loan Policy, partial payment of the principal indebtedness can reduce the amount of policy coverage. Careful consideration must be given to the effect of this provision in a case where the policy covers a mortgage on multiple parcels. In some instances, especially in a multi-state transaction, it may be well to add a "Last Dollar Endorsement," if it is available.

Other C&S provision – No. 10 in the Loan Policy and C&S 11 Owners Policy deal with "Liability Non-cumulative." One effect of these provisions is that unless an owner carries sufficient coverage in excess of all outstanding insured mortgages, the owner *may* end up either with no coverage at all, or some very significant lesser amount of coverage in the event of a serious or total loss. The loss paid to an insured mortgagee or mortgagees is deducted from the insurance available to the owner. Whenever a new mortgage is executed, the owner should review, and, if necessary, increase the Owner's Policy to cover all outstanding Mortgages, plus the owner's equity in the property.

C&S 12 in the Loan Policy and C&S 143 in the Owner's Policy deal with the insurer's right of subrogation. Destruction or material interference by he insured with the insurer's subrogation rights can destroy or severely diminish the policy protection.

The subrogation provisions in the ALTA policies are extensive. The rights of subrogation available to an insurer after a payment to an insured under a policy of insurance are well settled in insurance law. The ALTA subrogation provision recognize that in those cases where the payment under the policy does not fully cover the loss of the insured claimant that the subrogation rights of the insured to the extent of the balance of the insured's actual loss that was not recovered under the policy. The loan policy also specifically permits an insured mortgagee to release the personal liability of the debtor or guarantor, to release a portion of the mortgaged premises, and to engage in certain other activities that are normally engaged in by mortgagees, *but these otherwise normal acts are not permitted after the insured has knowledge of any claim of title or interest adverse to the title of the estate or interest as insured, or as to the priority or enforceability of the lien of the insured mortgage.* The policy also protects the

Company's right of subrogation against other insurers who may acquire the insured interest as a result of an indemnity guarantee or other policy of insurance.

No discussion of what is not insured should fail to mention provisions for mandatory arbitration, which can seriously affect one's rights of recovery under a policy. The ALTA policies contain such provisions, which are new with respect to title insurance.

The arbitration provisions may be triggered either by the Company or by the insured when the amount of insurance is one million dollars, or less. If the amount of insurance is in excess of one million dollars, arbitration can only be required when agreed to by both the Company and the insured. Special arbitration rules have been prepared by the American Arbitration Association and arbitration can only be utilized if not prohibited by applicable law in the state in which the dispute is to be resolved.

Endorsements may be available to eliminate or modify the arbitration provisions of the ALTA policy forms in most states {Ed. Note: see below}.

### ***Conclusion***

Title insurance provides very significant coverage to almost everyone acquiring an estate or interest in real property. However, it must be understood that there is no form of insurance available anywhere that is all-inclusive. It is important to understand and appreciate what the title insurance covers and what it does not cover. It is equally as important to understand that title insurance must be supplemented by competent legal advice and expertise. A good lawyer is essential to get the best out of the title insurance that is available for the transaction.

Lastly, but very importantly, a title claim rarely fully compensates the claimant for all of the loss that has been suffered, and nothing can fully compensate for the emotional trauma that frequently accompanies a title claim, particularly to an owner. The very best title policy is one that accurately reflects the status of the title based upon a complete and competent title examination, a title policy that provides peaceful possession to an owner, and an enforceable lien to the mortgage lender.

The editor would like once again to thank Mr. Pedowitz for his article and his contributions to the Land Title Industry.

### ***What the Title Insurance Policy Really Covers***

Ed. Note: Compare Mr. Pedowitz article to that prepared by Bushnell Nielsen entitled *What the Title Insurance Policy Really Covers*. That article may be found at the Publication/Archives link of the web site of Reinhart Boerner Van Deuren S.C., Attorneys At Law, located at <http://www.reinhartlaw.com/> .

### ***Related Articles***

Oscar Beasley has previously written an article entitled *Title Insurance – The Commercial Lenders Perspective* while Albert Rush prepared an article entitled *What*

*Mortgage Bankers Should Know About Title Insurance.* Both of these appear on the First American web site located at <http://www.firstam.com/>.

In the October 2000 of this publication we presented an article prepared by Marvin M. Bagwell Esq. entitled *After Divorce: When Does Coverage Continue under an Existing Title Insurance Policy?*

For a good overview of Title Insurance and the Title Insurance Industry, Professor John L. McCormack, of the Loyola University School of Law, prepared an good introduction to the subject matter in Thompson On Real Property, Thomas Edition, at Chapter 93. And, with regard to coverage generally, Jim Gosdin has written an excellent annotation published by the ABA/RPPT Section entitled Title Insurance, A Comprehensive Overview 2d ed. The remainder of the major treatise, annotations and some Law Reviews may be found on the Title Law Associates web site *Claims Litigation Index* link located at <http://www.titlelawannotated.com/> .

Readers interested in Practical Approaches for Title Holders & Title Companies as suggested by a nationally recognized Real Estate Transactions Counsel may want to read Harris Ominsky's new book entitled Real Estate Practice, Breaking New Ground published by the Pennsylvania Bar Institute PBI Press.

### ***Maximizing the Benefits of Title Insurance***

The material set forth below is a compilation of various seminar discussions that focused on how transactional counsel could maximize the benefit of the title insurance coverage negotiated for and contains practical suggestions of issues to be considered and addressed.

#### ***Preliminary and Background to Resource Material and Case Law***

- ***What Constitutes an Insurable Interest or Estate in Property*** [see Vance on Insurance, 3rd. Ed., by Buist M. Anderson, sec 26; Hart, *Insurable Interest in Real Property under a Title Insurance Policy* (1987);
- ***For a very brief general discussion of title insurance as a supplemental line of coverage*** see Bickelhaupt, General Insurance, pp 696-700;
- ***Title Insurance principle distinction from other forms of insurance are risk elimination, loss avoidance and single premium and indefinite term of coverage*** [see Palomar, Title Insurance Law, two Vol. Ed., sec 1:14 et seq.]
- ***Method of Land Title Assurance*** (Abstracts, Attorneys' Title Opinions & Title Insurance Compared) [see Patton and Palomar on Land Titles 3<sup>rd</sup> Ed. (2003), sec 41
- ***An Understanding of The Nature of the Basic Underwriting Risk*** [TLA Lecturer Series]
- ***A Lecture on the Commitment to Insure*** [TLA Lecturer Series; See also

*Beginners Guide to the Commitment for Owner's Title Insurance*, by Jack S. Levy, Esq., May/June 2000, Probate and Property; ]

### **Owners Policy Insuring Clauses**

- Ins. Cl 1: *Title Vested otherwise than as Stated in Policy*. NB in the owner's policy 3 separate clauses actually describe the insured estate. They are: **Schedule A item 2** which actually names the estate in land that is being insured; **C&S 1(a), Schedule a item 1 and 3** identifies the party in whom title to the estate in land is vested; **Schedule a item 5** describes the property in which the insured interest is held;
- Ins. Cl. 2: *Any defect in or lien or encumbrance on such title*. See lecture 2, *The Nature of the Basic Underwriting Risk*; Palomar, *Title Insurance Law*, Chapter 6, page 6-54; Gosdin, *Title Insurance, A comprehensive Overview*, 2d Ed. pages 50-56; Anno. 87 ALR3d 764, *What Constitutes a charge, encumbrance or lien within contemplation of a title Insurance Policy*; Anno. 18 ALR4th 1311, *Defects Affecting Marketability of Title within meaning of Title Insurance Policy*
- Ins. Cl. 3: *Lack of Right of Access*. Refer to legal access not actual physical access. see *L. Smirlock Realty Corp v. Title Guar. Co.*, 418 NE2d 650 (NY 1981); Burke, *Law of Title Insurance*, sec 2.2.4; Anno. 40 ALR2d 1247, n 4(c)
- Ins. Cl. 4: *Unmarketability of Title*. See C&S 1(g); ALR Marketable Title Index in ALR 2,3,4 & 5; Cases and texts cited in *Thomson on Real Property, Thomas Ed.*, Chapter 93 *Title Insurance*; Issues presented in class room discussion of *Mellinger v. Ticor Title Ins. Co.*, 113 Cal.Rptr.2d 357 (Cal.App. 2001), Nielsen, *The Title Insurance Law Newsletter*, December, 2001

### **The Identifying the Six Elements of a Title Insurance policy**

1. Insuring Clauses: contain the contractual provisions which obligate the insurer for damage sustained by the insured which arise from matters listed in these clauses; **Practice Aid:** see Ellis, *Title Insurance Law Handbook* (Ellis), pp. 211-250 and 611-646; Gosdin, *Title Insurance, A Comprehensive Overview* (Gosdin), section 3A;
2. Exclusions: list matters which may be included within the broad language of the insuring clauses but for which the company does not assume liability; **Practice Aid:** see Ellis, pp. 309-371 & 625-650 inc; Gosdin, section 3B; Burke, *Law of Title Insurance* (Burke), Chapter; Nielsen, *Title & Escrow Claims Guide* (Nielsen), Chapter 11; Palomar, *Title Insurance Law* (Palomar), Chapter 6
3. Conditions and Stipulations (C&S): list matters which are interpretive of the other policy provisions that impact upon and diminish coverage; states how a claim should be made under the policy and define the extent of the company's obligation in connection with the claim; **Practice aid:** Ellis, Policy Tables; Burke, Chapter 5; Gosdin, Sec 3E; Palomar, Chapter 8.
4. Schedule A: identifies the following: (i) the insured; (ii) the estate or interest being insured; (iii) the Owner; (iv) the Land; (v) the effective date of the policy; (vi) the mortgage being insured (loan policy only); **Practice aid:** Gosdin, sec 3C; Nielsen, Chapter 7; Palomar, Chapter 4;
5. Schedule B: list matters which are within the insuring clause, but for which the company *does not* assume liability and which are not listed in the exclusions from coverage. This is where the "special exceptions" go for matters known or knowable from an examination of title; **Practice Aid:** Gosdin, sec. 3D;
6. Endorsements: are attach to the policy and either extend or alter its coverage or interprets its provisions; **Practice Aid:** Gosdin, Exhibit 6.

**NB Practice Suggestion:** be certain to check the updates to the foregoing resources

TITLE LAW ASSOCIATES™ TITLE LIBRARY DATA BASE LOCATED AT [www.titlelawannotated.com](http://www.titlelawannotated.com)®

**THE THE SELECTION OF THE APPROPRIATE POLICY FOR THE TRANSACTION AND FOR YOUR CLIENT**

- **ALTA Owners and Loan Policy - 1970 (re. 10/17/84)**
- **ALTA Owners and Loan Policy - 1992**
- **"Covered" and "Uncovered" Causes of Action 1970 Policy** [ALTA symposium p -vii-]
- **"Covered" and "Uncovered" Causes of Action 1992 Policy**

**Coverage Limitations imposed by 1992 Policy Conditions and Stipulations Clause** [see Title Law Associates™ Website, Policy Format section of the Education link]

- **Definition of Insured - variance between policies** [see Title Law Associates™ Website, Policy Format section of the Education link]
- **Continuation of Coverage** [C&S Clause 2]

**Discussion: Gebhardt Family Investment Trust, L.L.C. v. Nations Title Insurance of NY, Inc., 2000 WL 719841 (Md. App.)** and other cases;

Title Rule: a deed to a trustee results in a change of ownership of the property, even if the grantor, the trustee, and the beneficiary are all the same individual and the beneficiary is given absolute power to revoke the trust. Under a 1992 ALTA owner's policy, if an insured conveys property to himself, as trustee, the trustee has no coverage under the original owner's policy. The same argument would not be available under the 1998 ALTA owner's homeowner's policy, which insures a trustee to whom the homeowner transfers title.

In *Gebhardt Family Restaurant, L.L.C. v. Nation's Title Ins. Co. of New York*, 132 Md. App. 457, 752 A.2d 1222, 1226-27 (2000), the court held that a transfer of land from two family members to an LLC, of which they were the only members, terminated coverage under a policy naming the individual family members as the insured parties. The court held that because of the conveyance to the LLC, which was a legally distinct entity, any subsequent loss would be the LLC's loss, which entity was not the insured party under the title policy either before or after the conveyance. See also *Covalt v. First American Title Insurance Co.*, 105 F.3d 669, 1997 WL 4273 (10th Cir. Jan. 7, 1997) (unpublished disposition) (ruling that transfer of real property, by quitclaim deed, from individual to trust in which individual retained an interest, prevented trust from claiming any rights under the title insurance policy originally issued to individual); *Simmons v. Reiner*, Ohio. App. LEXIS 5783 (Oh. App. Dec 3, 1999), at \*10 (holding that dower interest of husband, who had quit-claimed insured real property to his wife, was a contingent claim which "is not a marketable estate or interest" that would entitle him to coverage under title policy; and further holding that no loss had been incurred under the title policy until after title had been transferred); *General Medicine, P.C. v. Metropolitan Title Co.*, Mich. App. Ct. No. 216012 (March 2, 2001) (unpublished) (ruling that where plaintiff had conveyed property by quitclaim deed before discovering easement that burdened property, it had no standing to sue under title policy because conveyance was absolute and plaintiff had not retained any title interest); *Butera v. Attorneys' Title Guaranty Fund, Inc.*, 321 Ill. App. 3d 601, 607, 747 N.E.2d 949, 954 (2001) (holding that a deed from a trust to corporation, whose shareholders were the sole beneficiaries of the trust, was a transfer by purchase and not a transfer by operation of law that would provide continuing coverage under the owner's title policy originally issued to the trust); *Gray v. First American Title Ins. Co.*, 2003 Cal. App. Unpub. LEXIS 1163 (March 4, 2003), at \*7-8 (ruling that because insured individuals had transferred title to property to partnership consisting of themselves and another individual, previous claim they may have had against title insurer before conveyance

was not preserved, and stating that, "[the new partnership] is not an insured under the policy and may not be deemed an insured here").

### **STANDARD COVERAGE DISTINGUISHED FROM EXTENDED COVERAGE**

[see Title Law Associates™ Website at the *Title Insurance Underwriting Process* lectures

### **ENDORSEMENTS FOR THE LOAN POLICY**

#### **Discussion**

- **Are these endorsements confined to the loan policy alone?**
- **availability and costs;**
- **explanation of Rate Rules 2.7 and old Rule 6.23 [Pa. only]**

### **MANAGING RISK THROUGH THE USE OF ENDORSEMENTS**

#### **Covered Risks Including Matters of an Exclusionary Nature for Which Endorsements may be obtained**

- Environmental laws are specifically excluded from coverage. Counsel for the purchaser/developer or lender may not wish to be exposed to the "superlien" statutes, resulting in the request for the **ALTA Endorsement Form 8.1**.
- Another exclusion from coverage involves matters known to the insured but not disclosed to the insurer. This would include "imputed knowledge" which may become an issue where a title insurer is asked to insure the interest of an incoming partner or shareholder. Counsel for the insured may require a **Non-imputation Endorsement**. Another issue which may arise in the same insurance scenario is the possibility of partnership dissolution resulting from partnership changes. Counsel for the insured may require issuance of **Fairway or Partnership Endorsements**.
- Commercial transactions frequently involve zoning matters. Zoning is specifically excluded from coverage in the ALTA policies. Counsel for the developer or lender may not want to assume the risk that the property cannot be used for its intended purpose. In that case a **Zoning Endorsement** may be requested. The same exclusion may apply to condominium development. Counsel may additionally want assurance that the condominium has been properly created under the relevant statute(s), in which case a **Condominium Endorsement** may be requested.
- Depending upon the nature of the transaction a lender may be particularly concerned with exclusions dealing with doing business laws, consumer protection and truth in lending laws, or usury law. Consequently, counsel may insist upon obtaining **Doing Business, Truth-in-lending** [ALTA Endorsement form 2] or **Usury Endorsements**.

### **EXAMPLES OF GENERAL EXCEPTION ENDORSEMENTS**

Schedule B-2 of the ALTA Commitment to Insure contains 5 preprinted exceptions to title, commonly referred to as "general exceptions". When these exceptions are carried over and appear as exceptions in Schedule B-1 of the title insurance policy you have what is referred to

as "standard coverage" within the industry. This, by the way, is the standard by which the premium rate structure and charges are determined. When the preprinted general exceptions appearing in the title commitment are removed and do not appear in the title policy as issued you have the beginnings of an "extended coverage" policy. Competitive pressures have forced title companies in most jurisdictions to remove the "general exceptions" provided an acceptable survey and affidavits are furnished. Where the policy is issued with the "general exceptions" they may be removed by issuance with the policy of the **Deletion of General Exceptions Endorsement**.

The survey as presented may cover more than one parcel of land. Counsel may request a perimeter description and assurance that there are no gaps or gores between the parcels. This may be satisfied by issuance of a **Contiguity Endorsement**. In the event that a survey discloses a building encroachment resulting in a special exception, the title insurer may be willing to insure over the encroachment providing it is relatively minor in nature and has been in existence for an extended period of time. This may be done by issuing an **Encroachment Endorsement**. This endorsement does not guaranty the right to rebuild in the same location in the event of casualty loss.

### **EXAMPLES OF SPECIAL EXCEPTION ENDORSEMENTS**

In addition to addressing matters relating the general exceptions and policy exclusions, another important function of endorsements is to address coverage issues not otherwise contemplated by the policy resulting from specific factual situations resulting in the inclusion of "special exceptions" in Schedule B of the Policy. This may include issues of access, easements or easements appurtenant which may be essential to the use of the property. Counsel may require an **Access or CLTA 103.7 Endorsement; Easement Endorsement; Easement Encroachment Endorsement or a Tax Deed extinguishing easement endorsement**.

In the event examination of title discloses restrictive covenants of record imposing restrictions on the use or development of the property resulting in a special title exception counsel for the insured may require assurance that same will not result in a forfeiture or reversion of title or affect the validity, priority or enforceability of the lien of the insured mortgage. This may be accomplished issuing a Restrictions Endorsement. Lenders counsel also frequently require special loan policy endorsements where special exceptions to title appear. These relate to insuring against the impairment of the insured mortgage and include requests for **Comprehensive Endorsement(s)** and the ALTA Endorsement Form 9 [**REM Endorsement**].

### **EXAMPLES OF SPECIAL LOAN POLICY ENDORSEMENTS**

Other special Loan Policy Endorsements address various creative financing techniques including Equity Participation. With regard to equity participation concerns counsel for the lender may require **Shared Appreciation [SAM], Non Merger and Recharacterization Endorsements**. Depending upon the nature of the proposed loan transaction other endorsements frequently required by lenders and their counsel may include one of the following: **ALTA Endorsement Form 6, Balloon Mortgage Endorsement, Convertible Mortgage Endorsement, Letter of Credit Endorsement, Reverse Annuity Mortgage Endorsement, or Revolving Credit Endorsement**.

**ALTERNATIVE ENDORSEMENTS TO THE LOAN POLICY** [see Title Law Associates™ web site Endorsement link]

- **Are They Available and What is the Cost?**

• **Standard Endorsement Requests**

1. Address Endorsement [CLTA Form 116];
2. Aggregation Endorsement [ALTA Form 12];
3. Assignment Endorsement [ALTA Form 10; CLTA Endorsement form 104.1];
4. Assignment and Date Down Endorsement [ALTA Form 10.1]
5. Comprehensive Endorsement [CLTA Form 100];
6. Contiguous Land Endorsement Form [CLTA Form 116.4];
7. Easement Endorsement [CLTA Form 103.1 and 103.3];
8. Encroachment or Development Endorsement Forms [CLTA 102 Form series];
9. Foundation Endorsement [CLTA 102 series];
10. Mandatory Advance [CLTA 122 Form series];
11. Mechanics Lien Endorsement [CLTA 101 form series];
12. Mortgage Modification Endorsement [ALTA Form 11; CLTA Form 110.5] and Risks Involved;
13. Optional Advance Endorsement [CLTA Endorsement 108.8]
14. Policy Modification Endorsements [CLTA 107 Form series];
15. Public Street Access [CLTA Form 103.7];
16. Revolving Lines of Credit;
17. Seattle Endorsement amending Loan Policy Ex cl. 3(a) - concerns relating to underfunded constructions costs;
18. Subdivision Map Endorsement [CLTA Form 116.7;
19. Survey Endorsement [CLTA form 116.1];
20. Variable Rate Interest [CLTA Forms 111.5, 111.8, 111.10 & 111.11]

**TITLE INSURANCE - THE COMMERCIAL LENDER'S PERSPECTIVE -**

**WHAT DOES THE INSTITUTIONAL LENDER WANT FROM THE TITLE INSURER?**

**Major Issues for Lenders:**

1. Removal of the Creditors' Right Exclusion - how can this be accomplished in Pennsylvania?
2. Mechanic's lien Coverage - how can this be accomplished in Pennsylvania - Statutory provisions - Endorsement coverage?
3. Coverage for foreclosures, deeds-in-lieu of foreclosure and loan modifications;

4. Recharacterization issues in connection with contingent interest and shared appreciation mortgages, sale-leaseback transactions and "off balance sheet" and "synthetic lease" transactions
5. availability and necessity of reinsurance and co-insurance;
6. internal risk retention limits imposed on title companies;
7. multi-state coverage - NB "Tie-in" Endorsement only available intrastate in Pennsylvania;
8. availability, appropriateness and cost of title endorsements

**LENDERS NEED TO BE CONVERSANT WITH THE BENEFITS AND LIMITS OF TITLE INSURANCE COVERAGE**

**Three Critical Phases of the Title Insurance Underwriting Process**

1. **The Loan Documentation Phase;**
2. **The Loan Modification or Workout Phase;**
3. **The Title Loan Litigation or Claims phase;**

**1. The Loan Documentation Phase**

- **was the proper loan policy selected?**
- **were the proper endorsements required?**
- **were the proper arrangements made for coinsurance and reinsurance**
- **was there a recognition of the risks which are not covered by title insurance?**

NB see article prepared by James M. Pedowitz entitled *What Title Insurance Does Not Cover*, originally prepared for the NYSBA Real Property Section, reprinted with permission in *Title Management Today*, May 2000 and reprinted October 2003

**2. The Modification or Workout Phase**

- NB see "Loan Workouts, Modification and Foreclosure" below

**3. The Litigation or Policy Claim Phase**

- Tender of Claim
- The Title Insurers Acceptance of the Tender with Reservation of Rights
- Are the Reserved Rights clearly defined?
- The Insurers Duty to Defend: see *Manneck v. LTIC*, ( 1994 ) 28 Cal. App. 4th 1294
- Delay of the Insured in Giving Notice of a Claim to the Insurer: see *Straight Creek Processing Company v. Lawyers Title Insurance Corporation*, (4th Cir. 1996) 76 F.3d 375

- The Insured's Duty to Cooperate with the Insurer
- The Insurer's Right to Make Title as Insured

What is the liability, if any, of the insurer for any damage sustained by the lender due to delay in making title as insured? see Hatch v. First American Title Ins. Co., (D. Mass. 1995) 895 F.Supp.10

### **CO-INSURANCE AND REINSURANCE ISSUES**

- **Summary of Considerations** [see TLA Website link & Jack Murray Article at p 10 of 28 as revised]

**DEEDS IN LIEU OF FORECLOSURE** [Jack Murray's Article at page 5 of 28 as revised]

- **Deletion of Creditors' Rights Exclusion**
- **Failure to discharge debt in accordance with Loan Policy C&S 2(a)**
- **Consideration stated for deed-in-lieu**
- **Shared concerns**
- **Request for non-merger Endorsement - availability in Pennsylvania**
- **Title Rule & Requirements**
- **Lease-back to Borrower Risk and Requirements**
- **Should the Lender obtain a new Owners' Policy**

### **RECHARACTERIZATION ISSUES AND CONCERNS**

[see Title Law Associates™ web site, publications link, Title Insurance Underwriting, Principles and Exception Language, Recharacterization Bookmark

### **TITLE INSURANCE FOR LOAN PORTFOLIO ACQUISITIONS**

absent obtaining new policy or endorsement, loan portfolio purchaser will succeed to the interest of the seller in the title insurance policies issued when the loan was made;

- in which case only defects existing at the time of the original policy are covered;
- the purchase is charged with the knowledge of the seller unless a *non-imputation endorsement* is obtained;
- possibility of the existence of a *Fairway Problem*;
- Request for *date down endorsement* and *assignment endorsement* - are these available in the State?
- Request for *Piggyback Endorsement* if different title insurers were used in the original transaction - are they available in?

### **SPECIAL PROBLEMS FOR CONSTRUCTION LOANS**

- The insured's potential duty to disclose to the insurer the date of commencement of the work of improvements
- The lender/s potential liability for its failure to control the disbursement of the loan funds [cases listed here]
- The lender's dilemma presented by the presence of undisbursed loan funds & mechanics liens

### **LOAN WORKOUTS, MODIFICATIONS AND FORECLOSURE**

- Nature of Modification: see Murray, *Loan Foreclosures, Title Transfers, and Modification Structures*, *The Practical Real Estate Lawyer*, July and September, 1996; see also:
- Carpi, *Title Insurance Following Foreclosure*, presented at the Third Annual Spring CLE and Committee Meeting, Real Property Law Program *Beyond the Workout: Risks for Lenders Taking Back and Owning Real Estate*, Section of Real Property Probate and Trust Law, American Bar Association, May 7-9, 1992, page A-3;
- Geisen, *Routine Mortgage Modification Agreements: Lenders Beware*, *Real Estate Law Journal*, Winter 1989;
- Hart, [\*Debt Restructuring Problems in the Workout of Troubled Real Estate Assets\*](#), presented at: the New York University Real Estate Institute Conference for Attorneys, Accountants and Professionals entitled *Working Out Troubled Real Estate Assets*, May 20-21, 1991, The Waldorf-Astoria, New York, New York; the Land Title Institute of Maryland and Virginia Seminar entitled *Virginia-Washington D.C. - Maryland Real Estate Transactions and Title Maximizing the Benefit of Title Insurance*, October 24, 1997, Neumann College, Aston, Pennsylvania.

#### **Special Title Insurance Considerations in Workouts**

- *Modification of Mortgage Issue*
- *Available Endorsements Insuring Modification*
- *Premium Charges Applicable to Mortgage Modification Matters [Rate Manual*

5.12]

- *Fraudulent Conveyance Issues and the Avoidance Principal*
- *Special Title Ins. Concerns in Deed-in-lieu of Foreclosure*
- *The Issue of Recharacterization*
- *The Equitable Subordination Problem*
- *The Collateral Assignments Issue*
- *Bankruptcy Alternative*
- *The Creditors' Rights Exclusion*
- *Should the Lender Obtain an Owners Policy*
- McNearney, *Title Risks of Real Estate Purchased Via Foreclosure and Deed-in-Lieu of Foreclosure*, presented at the Third Annual Spring CLE and Committee Meeting, *Real Property Law Program Beyond the Workout: Risks for Lenders Taking Back and Owning Real Estate*, Section of Real Property Probate and Trust Law, American Bar Association, May 7-9, 1992, page A-11;
- Murray, *What you need to Know About Workout Strategies*, 1989, pub. on Firstam Web Site;
- Vanbuskirk, *Caution is Watchword in Loan Workouts*, *Lawyers Title News*, March/April, 1991;

- Werner; *Difference Between New Fee Coverage and the Continuation of Coverage of the Old Policy*, PLI Publication no. 375, chapter 7

**Potential Loss of Lien Priority cases:**

Resolution Trust Corporation v. BVS Development, Inc., (9th Cir. 1994) 42F.3d1026

Kaichen's Metal Mart, Inc. v. Ferro Cast Co., (1995) 33 Cal.App.4th 8

**Determine Any or All of the Following:**

- Was there a "pre-negotiation agreement" to avoid the exclusion for matters "created, suffered, assumed or agreed to" by the insured?
- Can the Creditors' Rights Exclusion be removed and how?
- Loss of Policy Coverage for:

"Post" Policy Matters: Mark Twain Kansas City Bank v. Lawyers Title Insurance Corporation, (E.D. Missouri, 1992) 807F.Supp.85

"Created, Suffered, Assumed or Agreed To": Transamerica Title Ins. v Alas; rights under separate Assignment of rents

**Other Matters To Be Determined:**

- In the event of foreclosure or deed-in-lieu of foreclosure, should the lender obtain a new owner's policy or should the lender rely on on the continuation of coverage under the original loan policy?
- How can creditor's Rights coverage be obtained if a new owners policy is purchased? and what are the requirements?
- What is meant by the language stating the creditors' rights exclusion applies to *the instant transaction only*?
- Can an "open" commitment be obtained if the lender desires to resell the property shortly after acquisition?

**CONCERNS DEALING WITH TITLE AGENTS**

- **Closing Protection Letters**
- **Legal Issues and Court decisions and Escrow Issues** [See September 2003]
- **Title Agent Liability for Non-Title Problems** - the Bortz Case (Pa. Super1997)

**TITLE AGENTS LIABILITY FOR NON-TITLE PROBLEMS**

The Pennsylvania Superior Court in Bortz v Noon et al, 698 A2d 1311 Pa. Super 1997), held that title agents owe a duty to purchasers to perform (i) all necessary duties of settlement on the property and (ii) all the necessary steps for the purchaser's acquisition and use of the property; This ruling imposes a broad, almost limitless duty upon title agents well beyond the title agents traditional roles as abstractor, conveyancer and insurer; The decision greatly expands a title agent's potential liability for negligence in sales

transactions; The decision requires that title agents engage in or perform a whole host of activities unrelated to the traditional activities of "conveyancing" or the issuance of title insurance, which activities may thereafter be determined to constitute the unauthorized practice of law. Prior to Bortz, the Pennsylvania Supreme Court had previously held that a title company *does not* engage in the unauthorized practice of law so long as it does not hold itself out to provide legal services and the activities it does perform relate solely to "conveyancing" and are incidental to the issuance of title insurance.

### ***FRAUD, FORGERY AND FUND DIVERSION***

- Summary of Issues
- Lack of Enforceable Obligation
- 1. see Bank of Miami Beach v Fidelity & Casualty of N.Y., (fla. 1970) 239 So.2d 97
- 2. see Fidelity National Title Insurance Company of NY et al v. Consumer Home Mortgage, Inc., (May 22, 2000) 708 N.Y.S.2d 445 [Title Counsel, Nov. 2000, Exhibit 44]
- Faulty Fund Disbursement by the Lender: see National Mortgage v. American Title Insurance Company, (N.C. 1980) 299 N.C. 369; 261 S.E.2d 844
- Defects which Attach or are created subsequent to date of policy; see Mark Twain Kansas City Bank v. LTIC, *supra*

Editor's Note: I would like to thank John ("Jack") Murray, Vice President and Special Counsel, First American Title Insurance Company, Chicago, for permission to include within these program materials his paper entitled *Title Insurance - The Commercial Lenders Perspective*, appearing at the firstam web site located at [www.firstam.com](http://www.firstam.com)

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