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THE 2006 ALTA POLICY FORMS AND ENDORSEMENTS: THE NEW TITLE POLICIES

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The American Land Title Association (ALTA) has adopted new title insurance policy and endorsement forms, effective June 17, 2006. This article will describe the new owner and loan policies (hereinafter referred to as the 2006 policies) and compare their coverages to the 1992 policy forms currently used by all title insurers in the Midwest. It will also contain a brief description of the new ALTA endorsements. In highlighting differences in coverages, this discussion assumes that the reader is already familiar with the provisions of the 1992 policy forms. Further, it will not contain quotations of text from either the 1992 or the 2006 policies. The 2006 policies and endorsements may be inspected and downloaded from the ALTA website at www.alta.org.

GENERAL PRINCIPLES

Several general principles may be discerned from the format and language of the 2006 policies.

First, the 2006 policies contain new terms and new or revised definitions. ALTA made these changes to accomplish three purposes: (a) to more accurately describe matters covered by the policy (matching the style of the ALTA residential policy forms); (b) to streamline language throughout the policies, but especially in the Conditions section; and (c) to expand coverage (see

e.g., the expanded definition of "Insured" in the 2006 owner's policy and the new definition of "Indebtedness" in the 2006 loan policy).

Second, the 2006 policies specify as covered risks many matters that traditionally have been viewed as covered by predecessor policies though not specifically mentioned in predecessor policy language. For example, the title industry has always viewed fraud and forgery as covered risks. Yet, the 1992, 1990, and 1970 policy forms do not include the words "fraud" and "forgery". The 2006 policies now specify fraud and forgery as covered risks. See Covered Risk 2(a)(i) on both the 2006 owner's policy and the 2006 loan policy. Under this general principle, the 2006 policies match the style of ALTA residential policy forms by more descriptively designating matters covered by the policy.

Third, in the 2006 policies, ALTA eliminated exceptions, or limitations, from the Exclusions from Coverage section. From the Insured's point of view, affirmative insuring provisions (Covered Risks in the 2006 policies) should be positives (+), while exclusions from coverage should be negatives (-). Yet, the 1992 and predecessor policies contained exceptions to the exclusions (- and -). Apparently, some courts failed to consider that two negatives equal a positive and insisted that coverage must appear in



affirmative language. ALTA revised the policy language to clarify that coverage indeed exists. See e.g., how the 2006 policies handle the traditional exclusion for violations of zoning and building codes in Covered Risk 5 and Exclusion 1(a). This new principle may be illustrated as follows:

1992 and predecessor policies: violations are *not* covered *unless* notice appears in public records and are not otherwise excepted on Schedule B.

2006 policy: violations *are* covered *if* notice appears in public records and are not otherwise excepted on Schedule B.

Thus, a Covered Risk must always be read together with a matching Exclusion and any related exceptions on Schedule B.

Fourth, the 2006 policies provide certain standard coverages in an automatic, or default, mode. For example, both 2006 policies automatically provide survey coverage under Covered Risk 2(c). This coverage may only be modified or eliminated by Schedule B exception. Thus, if the title insurer receives a survey and, upon examining it, discovers an encroachment or other adverse matter, the title insurer will automatically provide coverage over the matter unless it notes the matter in a Schedule B exception. If the insurer is not willing to provide the Insured with survey coverage of any sort (e.g., when no survey is furnished in a complex commercial transaction), then Covered Risk 2(c) must be neutralized by Schedule B exception.

Fifth, the 2006 loan policy specifically accommodates mortgages in electronic form. See e.g., the definition of "Mortgage" in Condition 1(h).

Finally, the 2006 policies provide expanded coverages. Claims administrators must become familiar with the new or revised provisions because many of them relate to the claims handling process.

NEW TERMS AND DEFINITIONS

Sections of the Policy

The affirmative insuring provisions of the 1992 and predecessor policies never had a name. In the 2006 policies, they bear the name Covered Risks. The Exclusions from Coverage, Schedule A, and Schedule B retain their traditional names. The Conditions and Stipulations, however, have been renamed as Conditions.

2006 Owner's Policy Definitions: Condition 1

Some of the new or expanded definitions include the following:

"Title" means the estate or interest described in Schedule A. This is convenient shorthand that streamlines language throughout the policy. Condition 1(j).

"Unmarketable Title" has a revised and expanded definition. Under the 1992 policy, unmarketability of title was limited to a prospective purchaser of the land who, by reason of a covered matter, could terminate without liability a contract requiring seller to deliver marketable title. The 2006 policy expands the definition to include prospective lessees of and lenders on the Title. Condition 1(k).

"Insured" has been redefined. Under the 2006 policy, the term includes everything contained in the 1992 definition- -but with more specificity. In addition, the 2006 policy includes the following as the "Insured:" a grantee in a deed executed by

the Named Insured and delivered for no consideration if the grantee:

- (1) is wholly owned by the Named Insured;
- (2) wholly owns the Named Insured;
- (3) is wholly owned by an affiliated entity of the Named Insured, provided the affiliated entity and the Named Insured are both wholly owned by the same person or entity; or
- (4) is a trustee or beneficiary of a trust created by a written instrument established by the Named Insured for estate planning purposes. Condition 1(d)(i)(D).

Item (4) is a significant addition to coverage. It eliminates the need for an assignment of policy or for an endorsement substituting Named Insureds whenever the Named Insured conveys the subject land to an estate planning device.

The term “Insured” also includes successors upon the conversion of a Named Insured entity to another kind of entity. Condition (1)(d)(i)(C). Presumably, this provision eliminates the *Fairway* problem and renders requests for the “Fairway” endorsement unnecessary.

“Amount of Insurance” now includes the amount shown in Schedule A and also any increases or decreases provided for in endorsements or through the operation of various provisions in the Conditions. Condition 1(a).

All other definitions in the 2006 owner’s policy provide the same coverage as the 1992 definitions. The language of most has changed, however, to accommodate new definitions and re-numbered policy provisions.

2006 Loan Policy Definitions: Conditions 1

Two new definitions merit attention because they add new coverage.

“Insured” has been redefined. Under the 2006 loan policy, the term includes everything contained in the 1992 policy. In addition, the 2006 policy includes as an Insured successors in ownership of the indebtedness, whether the successor owns the indebtedness for its own account or as a trustee or other fiduciary. Condition 1(e)(i)(A).

The term also includes the successor to an Insured upon conversion to a different kind of entity. Condition 1(e)(i)(D). The term “Insured” also includes the grantee in a deed executed by the Named Insured (after acquisition of the Land by foreclosure or deed in lieu of foreclosure) and delivered for no consideration if the grantee:

- (1) is wholly owned by the Named Insured;
- (2) wholly owns the Named Insured; or
- (3) is wholly owned by an affiliated entity of the Named Insured, provided the affiliated entity and the Named Insured are both wholly owned by the same person or entity. Condition 1(e)(i)(E).

Finally, the term “Insured” also includes the person or entity who has “control” of the “transferable record,” if the Indebtedness is evidenced by a “transferable record,” as these terms are defined by applicable electronic transactions law. Condition 1(e)(i)(B). This language was added to include third parties, such as MERS, or other service providers, even though the third party may not be named when an electronic transaction is involved.

Unlike predecessor policies, the 2006 loan policy defines the term “Indebtedness.” In the process of defining

the term, the 2006 loan policy expands coverage by specifying the elements of indebtedness that will be considered in measuring loss under the policy. Broadly stated, "Indebtedness" means the obligation secured by the insured mortgage. Condition 1(d). If the obligation is the payment of a debt, then "Indebtedness" specifically includes:

- (1) principal disbursed as of Date of Policy;
- (2) principal disbursed subsequent to Date of Policy;
- (3) construction loan advances made subsequent to Date of Policy;
- (4) interest;
- (5) prepayment premiums, exit fees, and other similar fees and penalties permitted by law;
- (6) expenses of foreclosure and other costs of enforcement;
- (7) advances to assure compliance with law or to protect the priority of the insured mortgage prior to acquisition of Title;
- (8) advances to pay taxes and insurance; and
- (9) reasonable amounts advanced to prevent deterioration of improvements on the land.

In measuring loss under the policy, the above amounts will be reduced by the total of all payments received by the Insured and by the amount forgiven by the Insured. Items (2) and (3) above are included solely for the purpose of measuring loss. The policy does not insure the validity, enforceability, or priority of these subsequent advances unless they fall within the affirmative insuring provisions of Covered Risk 11 or ALTA Endorsement Form 14.

COVERED RISKS

2006 Owner's Policy Covered Risks

The 2006 owner's policy contains 10 Covered Risks, compared to the 4 affirmative insuring provisions of the 1992 policy.

Subject to the Exclusions from Coverage, Exceptions shown on Schedule B, and the Conditions, the title insurer insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the amount of policy, sustained by the Insured by reason of:

Covered Risk 1: Title being vested other than as stated in Schedule A.

There is no change in coverage from prior policies.

Covered Risk 2: Any defect in or lien or encumbrance on Title.

Unlike predecessor policies, the 2006 owner's policy states that covered defects, liens, and encumbrances include, but are not limited to, the following risks:

- (a) defects covered by: forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation; lack of authority to convey; defect in the execution, acknowledgement, or delivery of a document; execution of a document pursuant to an invalid power of attorney; failure of a document to be properly recorded and indexed; a defective judicial proceeding; or failure to properly create an electronic document;
- (b) the lien of real estate taxes and special assessments;
- (c) matters that would be disclosed by an accurate and complete survey of the land, including

encroachments—adverse and otherwise—and building line violations.

The items noted in (a) and (b) above were generally considered covered by predecessor policies. The 2006 policy merely clarifies that coverage exists. Item (c), however, is new. It automatically provides an owner with survey coverage. Thus, if a title insurer does not wish to provide survey coverage to an owner, it must add an exception to Schedule B. The exception may be a generic “survey” exception or a specific exception relating to matters disclosed on a survey furnished to the title insurer. For Item (b) above (taxes and special assessments), a Schedule B exception will also be necessary. Thus, the 2006 policy heightens the importance of Schedule B and the necessity for reading all parts of the policy together.

Covered Risk 3: Unmarketable Title.

See discussion of new definitions above.

Covered Risk 4: Access.

There is no change in coverage from the 1992 policy.

Covered Risk 5: Enforcement of police powers laws, ordinances, permits, and regulations relating to building and zoning codes, subdivision regulations, and environmental protection laws if notice of violation or intention to enforce is recorded in the public records.

This coverage must be read together with Exclusion 1(a) and any related exception on Schedule B. The title insurer will be liable if it misses or otherwise fails to note a recorded notice of violation. See above discussion of general principles.

Covered Risk 6: Enforcement of police powers other than those noted in Covered Risk 5 if notice of enforcement appears in the public records.

This coverage must be read together with Exclusion 1(b) and any related exception on Schedule B. See comments under Covered Risk 5.

Covered Risk 7: Pending exercise of eminent domain power if notice of exercise is recorded in the public records.

This coverage must be read together with Exclusion 2 and any related exception on Schedule B. See comments under Covered Risk 5 above.

Covered Risk 8: Prior taking by a governmental body that is binding on a bona fide purchaser for value and without notice.

This coverage must be read together with Exclusion 2, any modifications to title finding or legal description in Schedule A, and any related exception on Schedule B. The title insurer will be liable if the prior taking appears in the public records and the insurer fails to (1) show the governmental body (or its grantee) in title to the part of the land taken; (2) delete the part taken from the legal description of the land; or (3) raise an appropriate Schedule B exception.

Covered Risk 9: Creditors' rights coverage.

This affirmative insuring provision provides creditors' rights coverage to the following extent:

- (a) in the event any transfer in the chain of title prior to the transaction vesting Title as shown in Schedule A is voided or set aside as a fraudulent or preferential transfer

- under the bankruptcy code, state insolvency laws, or similar creditors' rights laws, or
- (b) in the event the transfer vesting Title as shown in Schedule A constitutes a preferential transfer because it was not timely recorded or because it failed to give constructive notice to third parties.

This coverage must be read together with Exclusion 4 and any related exception on Schedule B. Unless it states otherwise on Schedule B, the title insurer will bear the creditors' rights risk for any transfer in the chain of title prior to the current deed to the Named Insured. It will also bear the risk if the deed to the Named Insured is not recorded within 30 days of closing, if the deed contains an erroneous legal description, or if the deed otherwise fails to give constructive notice to third parties. ALTA believes that this coverage matches coverage under the 1992 policy. The 1992 coverage, however, was contained in an exception to an Exclusion. By moving it to the Covered Risk section of the 2006 policy, ALTA intended to clarify coverage.

Covered Risk 10: Post-policy coverage.

This provision protects the Insured against loss arising from defects, liens, or encumbrances falling within the coverage under Covered Risks 1 through 9 that are created, attach, or are recorded in the public records in the time period between Date of Policy and the recording date of the instrument that vests Title as insured. This coverage is only relevant to title operations that issue final policies at the closing table showing Date of Policy as the closing date. It is irrelevant when final policies show Date of Policy as the date of recording. This coverage may become known as "Gap

Coverage." There are, however, several "gaps" in the title industry:

- (1) the time period between the current date and the latest day for which the county recorder has posted and indexed recorded instruments (the "gap" in which no one knows what instruments affecting title may have been recorded);
- (2) the "gap" between the day of closing and the (earlier) effective date of the latest title commitment; and
- (3) the "gap" between the day of closing and the (later) day of recording the instruments that were delivered at closing (the Covered Risk 10 "gap").

In addition, this coverage must be read together with Exclusion 5, excluding coverage over real estate taxes and special assessments that become liens during the "gap" that is, item (3) above.

Finally, the Covered Risks section of the 2006 policy contains an unnumbered statement of the title insurer's defense obligations. These obligations are expanded over the 1992 policy provision to the extent that the 2006 policy expands coverage in Covered Risks 1 through 10. They are, however, limited by the Conditions section of the 2006 policy.

2006 Loan Policy Covered Risks

The 2006 loan policy contains 14 Covered Risks, compared to the 8 affirmative insuring provisions of the 1992 policy.

Many of the Covered Risks in the 2006 loan policy are identical to equivalent Covered Risks in the 2006 owner's policy. See discussion above on Covered Risk 1 (Title vesting), Covered Risk 2 (defects, liens, and encumbrances), Covered Risk 3 (Unmarketable Title), Covered Risk 4 (Access), Covered Risk 5 (building and

zoning codes, subdivision regulations, and environmental protection laws), Covered Risk 6 (other police powers), Covered Risk 7 (pending eminent domain), and Covered Risk 8 (prior eminent domain). Also, Covered Risk 14 of the loan policy (post-policy coverage) matches Covered Risk 10 of the owner's policy. The following paragraphs discuss Covered Risks particularly relevant to an insured lender.

Subject to the Exclusions from Coverage, Exceptions shown on Schedule B, and the Conditions, the title insurer insures, as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after the Date of Policy, against loss or damage, not exceeding the amount of policy, suffered by the Insured by reason of:

Covered Risk 9: The invalidity or unenforceability of the lien of the insured mortgage.

Unlike prior policies, the 2006 loan policy states that Covered Risk 9 includes, but is not limited to, a specified list of matters that may impair the lien of the insured mortgage. The list includes the same matters covered under Covered Risk 2(a) as defects in or liens or encumbrances on the Title, e.g., fraud, forgery, defective execution, etc. See comments above for 2006 owner's policy Covered Risk 2(a).

Covered Risk 10: Lack of priority of the lien of the insured mortgage over any other lien or encumbrance.

This provision reverses the point of view of paragraph 6 of the insuring provisions of the 1992 policy, which addressed the priority of liens over the insured mortgage. In the end, coverage is the same.

Covered Risk 11: Mechanics lien and special assessment coverage.

ALTA intends that mechanics lien coverage under the 2006 loan policy should match mechanics lien coverage under the 1992 policy. In keeping with general principles, however, ALTA deleted Exclusion 6 of the 1992 loan policy. Under the 2006 loan policy, therefore, mechanics lien coverage appears in only one place—Covered Risk 11(a). This provision insures the priority of each and every advance under the insured mortgage over mechanics lien rights when the work is either:

- (1) contracted for or commenced on or before Date of Policy or
- (2) contracted for, commenced, or continued after Date of Policy if the work is financed, in whole or in part, by the proceeds of the insured mortgage that the insured lender has advanced or is obligated as of Date of Policy to advance.

ALTA added the word "continued" to achieve clarity and not to add coverage.

Presumably, any situation falling outside the stated bounds of Covered Risk 11(a) will not be covered by the policy. For example, work contracted for subsequent to Date of Policy and not financed by the insured mortgage (e.g., the enhancement concept under Illinois law) will not be covered.

The 2006 loan policy automatically (by default) provides the mechanics lien coverage specified in Covered Risk 11(a) and contains no limiting Exclusion. Thus, when a title insurer is not willing to accept the mechanics lien risk, it must limit, modify, or eliminate Covered Risk 11(a) by Schedule B exception. Obviously, Schedule B should always include exceptions for recorded mechanics lien claims.

Interestingly, ALTA did not revise the 1992 construction loan policy. This policy form provides no mechanics lien coverage and adds it, bit by bit, as the construction project progresses, by endorsement. Time will tell whether construction lenders will prefer the 2006 loan policy or the 1992 construction loan policy.

Covered Risk 11 contains an odd pairing of lien priority problems. Covered Risk 11(a) relates to mechanics lien claims, while Covered Risk 11(b) insures against lack of priority of the lien of the insured mortgage over the lien of assessments for street improvements under construction or completed at Date of Policy. This provision matches coverage under ALTA Endorsement Form 1. This coverage will be provided automatically (by default) unless the title insurer notes pending or approved special assessments or special service area taxes on Schedule B.

Covered Risk 12: Assignment.

This provision is identical to affirmative insuring provision 8 of the 1992 loan policy. It insures the validity and enforceability of an assignment of the insured mortgage, provided the assignment appears in Schedule A of the policy. This provision is intended to cover assignments at closing.

Covered Risk 13: Creditors' rights coverage.

Similar to 2006 owner's policy Covered Risk 9, Covered Risk 13(a) insures the insured lender against a fraudulent or preferential transfer occurring in the chain of title prior to the transaction creating the lien of the insured mortgage. The phrase "transaction creating the lien" may be problematic. For an insured purchase money mortgage, the mortgage itself and also the deed through which the

mortgagor obtains title may constitute the "transaction creating the lien." Creditors' rights problems with these instruments are not covered by Covered Risk 13 and are specifically excluded from coverage under Exclusion 6. On an insured refinance mortgage, however, creditors' rights problems with the deed through which the mortgagor obtained title probably fall within the scope of Covered Risk 13.

Covered Risk 13(b) covers the lender in the event the insured mortgage is declared a preferential transfer because it was not recorded within 30 days of closing or because it fails to give constructive notice to third parties. These provisions must be read together with Exclusion 6.

The 2006 loan policy also contains an unnumbered statement of the title insurer's defense obligations.

EXCLUSIONS FROM COVERAGE

2006 Owner's Policy Exclusions from Coverage

The 2006 owner's policy contains 5 Exclusions, compared to the 4 Exclusions of the 1992 policy.

The following matters are expressly excluded from coverage, and the title insurer will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

Exclusion 1: Police power laws, ordinances, permits, or regulations relating to building and zoning codes, subdivision regulations, and environmental protection laws or the effect of violation thereof. Exclusion 1(a). This provision also excludes other police powers not mentioned above. Exclusion 1(b).

Exclusion 1(a) must be read together with Covered Risk 5 and any related exception on Schedule B.

Exclusion 1(b) must be read together with Covered Risk 6 and any related exception on Schedule B.

Exclusion 2: Eminent domain (pending or prior).

This Exclusion must be read together with Covered Risks 7 and 8 and any related exceptions on Schedule B.

Exclusion 3: Bona fide purchaser status.

With one exception, the language of Exclusion 3 is identical to Exclusion 3 of the 1992 policy. These exclusions relate to the Insured's status as a bona fide purchaser for value and without notice. The parts of Exclusion 3 are commonly referred to as:

- (a) the "created by the Insured" Exclusion;
- (b) the "knowledge of the Insured" Exclusion;
- (c) the "no loss or damage" Exclusion;
- (d) the "post-policy event" Exclusion; and
- (e) the "no value paid" Exclusion.

Exclusion 3(d) (post-policy event) is modified so that it now must be read together with Covered Risks 9 and 10.

Exclusion 4: Creditors' rights exclusion.

The policy excludes coverage for any claim under the bankruptcy code, state insolvency laws, or other creditors' rights laws that the transaction vesting the Title as shown in Schedule A is a fraudulent or preferential transfer. This provision must be read together with Covered Risk 9. The Covered Risk covers prior transactions in the chain of title. The Exclusion, on the other hand, relates to the current transaction. For full

creditors' rights coverage, therefore, the Insured must request an endorsement to modify or eliminate the impact of Exclusion 4. New ALTA Endorsement Form 21-06 will accomplish this goal.

Exclusion 5: Taxes and special assessment in the "gap".

This Exclusion must be read together with Covered Risk 10. See comments above.

2006 Loan Policy Exclusions from Coverage

The 2006 loan policy contains 7 Exclusions from Coverage, compared to 6 in the 1992 policy.

Exclusions 1 and 2 of the 2006 loan policy are identical to Exclusions 1 and 2 of the 2006 owner's policy.

Exclusion 3 is also identical, except that Exclusion 3(d) (post-policy event) is modified to refer to Covered Risks 11, 13, and 14. Thus, this Exclusion must be read together with those Covered Risks.

Exclusion 4: Doing business laws.

The language of this Exclusion is modified for simplification. Its meaning, though, matches Exclusion 4 of the 1992 policy.

Exclusion 5: Usury, consumer credit protection, and truth-in-lending laws.

The language of this Exclusion is modified for simplification. Its meaning, though, matches Exclusion 5 of the 1992 policy.

Exclusion 6: Creditors' rights exclusion.

The policy excludes from coverage any claim under the bankruptcy code, state insolvency laws, or other creditors' rights

laws that the transaction creating the lien of the insured mortgage is a fraudulent or preferential transfer. This Exclusion must be read together with Covered Risk 13. The Covered Risk covers prior transactions in the chain of title. The Exclusion, on the other hand, relates to the current transaction. For full creditors' rights coverage, therefore, the Insured must request an endorsement to modify or eliminate the impact of Exclusion 6. New ALTA Endorsement Form 21-06 will accomplish this goal.

Exclusion 7: Taxes and special assessments in the "gap".

This Exclusion must be read together with Covered Risk 14. See comments above.

Unlike the 1992 loan policy, the 2006 loan policy contains no Exclusion relating to mechanics lien claims. Under the 2006 loan policy, mechanics lien coverage is provided through the interplay of Covered Risk 11(a), Schedule B exceptions, and special endorsements.

CONDITIONS

The Conditions are the truly "fine print" of the 2006 ALTA policy forms. Read together with all other parts of the policy, the Conditions inform coverages under the policy and losses payable under the policy, as well as delineate the rights, duties, and obligations of both the insurer and the Insured. The Conditions of the 2006 policies are too lengthy to be discussed in full in this Article. Attorneys for Insureds, title underwriters, and claims administrators should read and understand these provisions because, in some instances, failure to comply with the Conditions may result in a loss of coverage under the policy.

The discussion below highlights differences between the 2006 Conditions

and the Conditions and Stipulations of the 1992 policies.

2006 Owner's Policy Conditions

The 2006 owner's policy contains 18 Conditions, compared to 17 Conditions and Stipulations of the 1992 policy.

Condition 1: Definitions.

See discussion above.

Condition 4: Proof of Loss.

The 2006 policy changes the burden of proving loss. Conditions and Stipulations 5 of the 1992 policy required the Insured to submit a signed and sworn proof of loss within 90 days after ascertaining the facts giving rise to loss. In contrast, the 2006 policy requires the title insurer to make the initial attempt to determine the amount of loss after receiving notice of a claim. In the event the title insurer cannot determine the amount of loss, it may require the Insured to submit a signed proof of loss. The 2006 policy eliminates the 90 day time period and the need for the Insured to swear to the proof of loss. Finally, the 1992 policy stated that if an Insured's failure to timely submit a proof of loss prejudiced the title insurer, the insurer could terminate its liability under the policy. The 2006 policy eliminates this provision as well. ALTA believes, however, that Condition 4 of the 2006 policy permits the title insurer to withhold payment under the policy until the Insured furnishes a signed proof of loss if requested to do so by the title insurer.

Condition 6: Duty of Insured Claimant to Cooperate.

The 1992 policy contains no specific equivalent to Condition 6 of the 2006 policy. Rather, Condition 6 pulls together various provisions from Conditions and Stipulations 4 and 5 of the 1992 policy.

Taken together, there is no substantive difference in coverage.

Condition 7: Options to Pay or otherwise Settle Claims; Termination of Liability.

The 2006 policy eliminates the 1992 requirement that the Insured surrender the policy if the title insurer pays to the Insured the Amount of Insurance.

Condition 8: Determination and Extent of Liability.

The 2006 policy adds significant new coverage under this Condition. If the title insurer exercises its remedies by defending or prosecuting litigation and, in the end, is unsuccessful in establishing Title as insured, then:

- (1) the Amount of Insurance shall be increased by 10%, and
- (2) the Insured shall have the right to have the loss determined either as of the date the claim was made or as of the date it is settled and paid. Condition 8(b)(i) and (ii).

These provisions are intended to benefit an Insured who must wait for final resolution of a claim during the course of litigation. In addition, the 2006 policy eliminates the coinsurance provision contained in Conditions and Stipulations 7(b) of the 1992 owner's policy.

Condition 12: Payment of Loss.

The 2006 policy eliminates the 1992 requirement that, prior to receiving payment of loss, the Insured must produce the policy for endorsement of the payment.

Condition 13: Rights of Recovery upon Payment or Settlement.

This Condition has been renamed (from Subrogation upon Payment or Settlement). In addition, the language has been modified for clarification. ALTA believes that Condition 13(a) now makes clear that when a claim has been settled, the title insurer is automatically subrogated and entitled to the rights of the Insured without need of further documentation. The title insurer may, however, request the Insured to execute transfer documents, and the Insured has an obligation to cooperate. Further, if the payment of a claim does not make the Insured whole, the title insurer will defer its subrogation rights until the Insured recovers its entire loss. ALTA believes that this is not new coverage—just clearer coverage.

Condition 14: Arbitration.

The 2006 policy changes the threshold below which either the Insured or the title insurer can force the other into arbitration from \$1 million in the 1992 policy to \$2 million. In addition, the 2006 policy changes the rules under which arbitration will proceed from the Title Insurance Arbitration Rules of the American Arbitration Association to the Title Insurance Arbitration Rules of the American Land Title Association.

Condition 15: Liability Limited to this Policy; Policy Entire Contract.

The 2006 policy adds Condition 15(d) which makes clear that any endorsement to the policy is made a part of the policy and is subject to all the provisions of the policy, except as specifically modified by the terms of the endorsement. This provision incorporates all endorsements into the policy, even those that do not contain the usual "boilerplate" incorporation language.

Condition 17: Choice of law; Forum.

This is an entirely new Condition. In construing the policy, a court or arbitrator

shall apply the law of the jurisdiction where the land is located. Choice of law principles shall not apply. Any litigation brought by the Insured against the title insurer must be filed in a state or federal court within the United States or in any of its territories having appropriate jurisdiction.

Finally, the 2006 policy deletes the apportionment provision found in Conditions and Stipulations 8 of the 1992 policy. This provision applied if the policy insured two or more parcels that were not used as a single site. Loss sustained on one parcel would be paid on a pro rata basis, comparing its value to the other parcel or parcels. This result could only be modified if the Insured and the title insurer agreed on an apportionment of value differing from a simple pro rata formula. By eliminating the apportionment provision, the 2006 policy gives the Insured the benefit of up to the total Amount of Insurance applicable to a proved loss on only one parcel. This new coverage is similar to protection provided to the Insured under a tie-in endorsement.

2006 Loan Policy Conditions

The 2006 loan policy contains 17 Conditions, compared to 16 Conditions and Stipulations of the 1992 loan policy. The 2006 loan policy Conditions are similar to the Conditions of the 2006 owner's policy, differing, for the most part, only because the Insured is a lender rather than an owner. Thus, changes found in Condition 4 (Proof of Loss); Condition 6 (Duty of Insured Claimant to Cooperate); and Condition 8 (Determination and Extent of Liability) match the identically numbered Conditions of the 2006 owner's policy. Loan Condition 11 (Payment of Loss) matches owner's Condition 12. Loan Condition 12 (Rights of Recovery upon Payment or Settlement) matches owner's Condition 13. Loan Condition 13

(Arbitration) matches owner's Condition 14. Loan Condition 14 (Liability Limited to this Policy; Policy Entire Contract) matches owner's Condition 15. Loan Condition 16 (Choice of Law; Forum) matches owner's Condition 17. See comments above.

Highlights of changes from the 1992 policy relevant to lenders only include the following:

Condition 1: Definitions.

See discussion above.

Condition 2: Continuation of Insurance.

This provision is shorter than its 1992 counterpart because new definitions allow for streamlining of language. Also, some of the 1992 provisions have been moved or rendered unnecessary. In its simpler form, this Condition provides that coverage under the policy continues, as of Date of Policy, in favor of an Insured lender after the Insured acquires the Title (by foreclosure or deed in lieu of foreclosure) or after acquisition and subsequent conveyance by the Insured lender, provided the Insured either retains an interest in the Title, holds a new purchase money mortgage on the Land, or retains liability under any warranty related to the conveyance.

Condition 7: Options to Pay or otherwise Settle Claims; Termination of Liability.

This Condition provides additional coverage because of the expanded definition of "Indebtedness." The title insurer retains the same options as under the 1992 policy:

- (a) in the event of total failure of Title, to pay or tender the Amount of Insurance or to purchase the Indebtedness, or
- (b) in the event of a partial loss, to pay or otherwise settle with parties

other than the Insured or with the Insured.

If the title insurer purchases the Indebtedness, the Insured must assign the Indebtedness, the insured mortgage, and any collateral security to the title insurer. If the title insurer pays the amount of insurance or purchases the indebtedness, liability under the policy is terminated. The 2006 loan policy eliminates the 1992 requirement of surrender of the policy upon such termination of liability. If the title insurer pays or settles a claim for less than the amount of insurance, liability under the policy is terminated as to the claim matter only.

Condition 9: Limitation of Liability.

This provision coordinates the measurement of loss with the inclusion of post-policy advances in the definition of "Indebtedness." The 2006 policy deletes 1992 Conditions and Stipulations 8(d), which limited liability as to post-policy advances.

Condition 10: Reduction of Insurance; Reduction or Termination of Liability.

According to 1992 loan policy Conditions and Stipulations 9(b), any payment on the insured mortgage reduced the amount of insurance under the policy. The 2006 policy eliminates this provision. As a result, any payment on the insured mortgage reduces the Indebtedness, not the Amount of Insurance. Because a partial pay-down of the insured mortgage will leave the Amount of Insurance intact, ALTA believes that this result is the same as coverage under a "Last Dollar" endorsement. The 2006 policy renders requests for the "Last Dollar" endorsement unnecessary.

Finally, the 2006 loan policy deletes entirely 1992 Conditions and Stipulations 10 (Liability Noncumulative). This provision reduced loss payments to an insured junior lender to the extent of loss paid to a senior lender insured under another policy. Notwithstanding the deletion, however, the method of measuring loss under the 2006 policy will result in the same reduction of loss payments to an insured junior lender.

SCHEDULE A

Aside from minor changes aimed at better identification of the title insurer and file references, ALTA made two changes to Schedule A. First, a title insurer may no longer choose to place the legal description of the insured Land on an optional Schedule C. The 2006 policies require that the legal description must be shown at Paragraph 4 of Schedule A in the 2006 owner's policy and at Paragraph 5 of Schedule A in the 2006 loan policy. Second, ALTA added an optional Paragraph 6 to Schedule A of the 2006 loan policy. This new paragraph contains a list of commonly requested loan policy endorsements with check boxes beside each listed endorsement. If the title insurer uses this optional provision and checks various boxes, then the checked endorsements are incorporated into the loan policy, even if the endorsements are never attached to the policy. The listed endorsements all carry the -06 designation, thereby indicating they are designed for incorporation or attachment to the 2006 policy form. Input, in addition to checking a box, is required for the 8.1-06 endorsement (environmental protection lien) and for the new 22-06 location endorsement. Local endorsements and ALTA endorsements not listed in Paragraph 6 of Schedule A must, as always, be attached to the final policy. The 2006 owner's policy has no equivalent provision for incorporation of endorsements by reference.

SCHEDULE B

On the 2006 owner's policy, ALTA merely suggests what may appear on Schedule B. Thus, Schedule B may include the 5 General Exceptions (also known as Standard Exceptions), regional or local exceptions, and "requirements" exceptions. Title insurers will probably continue existing practices for formatting Schedule B. And, obviously (and as mentioned throughout this article), title insurers will also list on Schedule B all title exceptions relating to the Land in question and its chain of title and for which the insurer is not willing to accept liability. It cannot be stressed too often that Schedule B must be read together with every other section of the policy.

On the 2006 loan policy, the same comments apply. In addition, ALTA offers a choice. The title insurer may modify the Schedule B lead-in sentence to read, "*Except as provided in Schedule B – Part II, this Policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees or expenses that arise by reason of:*" (optional changes in italics). On the other hand, the title insurer may choose to ignore the italicized phrase and continue to use the lead-in sentence from the 1992 policy. ALTA believes there is no substantive difference in the two choices. It suggests, however, that the revised language adds clarity. The lead-in language for Schedule B – Part II (matters subordinate to the lien of the insured mortgage) is unchanged.

ENDORSEMENTS

ALTA revised all of its endorsement forms to (a) update the language, (b) utilize new policy definitions, (c) capitalize all terms defined in the 2006 policies, and (d) revise cross references to re-numbered provisions in the 2006 policy forms. In addition, ALTA created several new endorsement forms. ALTA added a -06 suffix to its endorsement numbering system to

designate endorsements appropriate for use with the 2006 policies. A complete list of all ALTA endorsements, as well as the text of all ALTA endorsements is available on the ALTA website at www.alta.org. Except as noted below, coverages under the revised endorsements match the coverages provided in the original endorsement forms.

Coverages have been added to the Form 7 series of endorsements (Manufactured Housing). Endorsement Form 7.1-06 provides insurance to a lender relating to the conversion of a manufactured housing unit to real property, the ownership of and liens against the unit, the enforceability of the lien of the insured mortgage against the unit, and the physical location of the unit on the Land. Except for insurance relating to enforceability of a mortgage, Endorsement Form 7.2-06 provides the same insurance to an owner.

The Form 9 series (Restrictions, Easements, and Minerals) has been expanded. Endorsement Form 9.4-06 is a new "owner's comprehensive" endorsement for unimproved land, and Endorsement Form 9.5-06 is a new "owner's comprehensive" endorsement for improved land.

ALTA added a new Form 22 series of location endorsements. New Endorsement Form 22-06 is a standard location endorsement ALTA hopes will replace local versions. New Endorsement Form 22.1-06 requires attachment of a map.

COMMITMENTS

ALTA has revised its standard form of commitment. The new commitment form allows for flexibility and local variation. With one exception, however, coverages under the new commitment match the old. The old commitment states that it remains in force for 6 months or until policy issues, whichever first occurs. In the 2006

commitment, the title insurer may lengthen or shorten the duration of the commitment by inserting any number it wishes into this commitment provision. The title insurer is also free to retain the traditional 6 month duration. Time will tell whether title insurers will vary from the traditional practice. The text of the new commitment may be viewed on the ALTA website.

CONCLUSION

In a recent interview with Joe Bonita, member of the ALTA drafting committee and formerly Chief Underwriting Counsel for the Fidelity group of title insurers, this reporter asked whether customers will embrace the 2006 policies. Joe responded, "If any attorney chooses the 1992 policy for a client when the 2006 policy is available, then that attorney should look to his or her malpractice policy." It's that good, according to Joe!

We welcome your topic suggestions for future Title Issues. If you are interested in submitting your ideas, please e-mail us at: Patrick.quist@ctt.com or complete this form and mail to:



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Date: _____